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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

NO. 1103

MILDRED R. LAHMAN surviving widow and administrator of estate of John H. Lahman deceased

appellant

VS

W. E. GOULD AND COMPANY, HARRIET B. GOULD executor of will of W. E. Gould deceased and PHILIP H. MITCHEL master in chancery

appellees

APPEALS FROM THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT AND SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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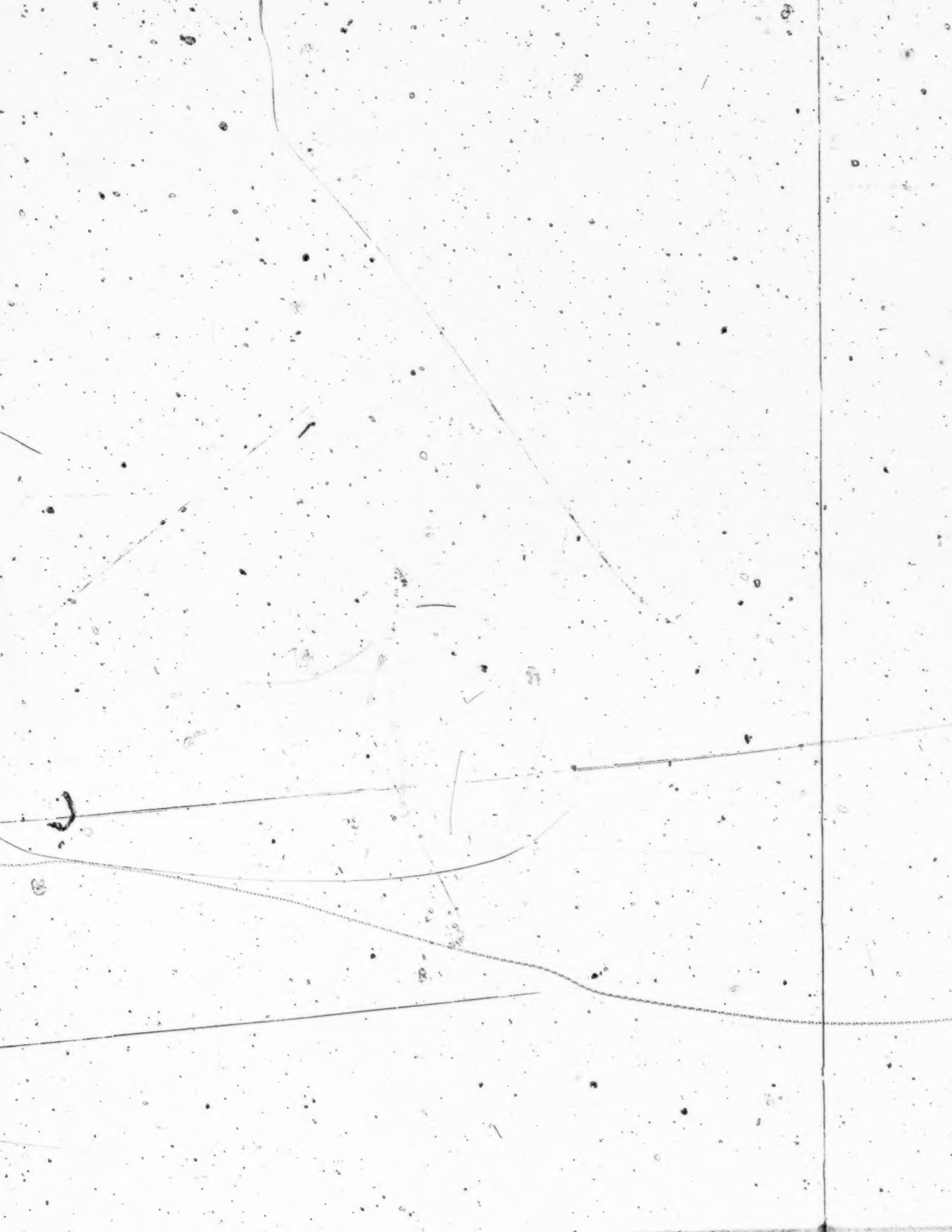

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JURISDICTIONAL STATEMENT

Appellant Mildred R. Lahman surviving widow and administrator of estate of John H. Lahman deceased respectfully submits this jurisdictional statement in support of her appeal to this court from orders or judgments hereinafter mentioned of appellate court of Illinois first district and supreme court of Illinois.

(a) The opinion below—The opinion of the Illinois appellate court is reported at 82 Ill App 2d 220; 226 NE 2d 443. appendix 5-16.

The Illinois supreme court did not render any opinion but entered certain orders denying appellant's petition and motions to obtain a review of the judgment of the Illinois appellate court. appendix 17.

Definitions and explanations of terms and abbreviations—We respectfully refer the court to pages 1 to 5 of appendix for definitions and explanations of certain terms and abbreviations found in the record and in this jurisdictional statement.

In addition, as used in this jurisdictional statement the abbreviations "1 abs", "2 abs", "3 abs" and "4 abs" mean and refer to volumes 1, 2, 3 and 4 respectively of printed abstract of record filed by Lahman in the courts below and included in the record filed in this court.

(b) Grounds on which jurisdiction of this court is invoked

—*(b)(i)—Nature of the proceedings*—May 16, 1955 Lahman commenced these proceedings in equity against Gould and his loan company in the circuit court of Cook county Illinois cause no. 55 C 7294:

1. To recover from defendant loan company by way of redemption, restitution or constructive trust all shares in Interlake, being 650 preferred and 10,000 common shares, which the loan company claims to have acquired from Lahman free and clear of any equity or right of redemption or other claim by reason of two informal 1-page letters dated May 29, 1950—appendix 18, 19—which were signed in connection with what is referred to as the May 29, 1950 arrangement;

2. To recover from defendant loan company by way of redemption, restitution or constructive trust 117.2 shares in Frantz, or new shares which now represent those 117.2 shares, which the loan company claims to have acquired from Lahman free and clear of any equity or right of redemption or other claim by reason of two informal 1-page letters dated June 26, 1951—appendix 20, 21—which were signed in connection with what is referred to as the June 26, 1951 arrangement; and

3. To recover from the loan company damages for loss of income and earning power and for costs and expenses incurred by reason of the wrongful acts and conduct of Gould and his loan company.

July 7, 1955 the chancellor referred the case to Philip H. Mitchel master in chancery to take testimony and report the same to the court together with his conclusions of law and fact therein. 1 abs 23. The case stood referred to the master until December 18, 1963 when the master filed his report dated July 9, 1963 and supplemental report dated December 18, 1963 in the trial court. 2 abs 1, 413.

Both these reports were adverse to Lahman and recommended that his cause be dismissed for want of equity.

However, in the meantime on September 27, 1957 at the close of Lahman's case in chief before the master, defendants made a motion under section 64(5) of the civil practice act which required the master to "weight the evidence"—*Ill Rev Stat* ch 110 §64(5)—for

> "The entry of a final decree of dismissal of plaintiff's amended complaint and of the cause for want of equity on the entire merits on the ground that upon the facts and the law plaintiff is entitled to no relief against these defendants or either of them."

At this point both Lahman and Gould had testified at length before the master, Lahman's testimony covering 924 pages and Gould's covering 1,002 pages of the transcript. Their testimony was conflicting on the basic issues. 2 abs 574, 575.

In support of their motion defendants filed with the master a 186-page printed brief which vigorously attacked Lahman's credibility. 2 abs 575. But the master accepted and gave full credence to Lahman's testimony and disbelieved Gould's testimony, for under date of May 19, 1958 the master issued his report in respect of defendants' motion under section 64(5) and concluded—2 abs 575:

> "That after due consideration of the evidence presented by the plaintiff the master is of the opinion that plaintiff has presented a *prima facie* case and the master recommends that defendants' motion be dismissed."

By December 18, 1963 however, when the master filed in the trial court his final reports adverse to Lahman he had made a complete about-face, and stated that Lahman's testimony was not worthy of belief and accepted Gould's testimony as true. 2 abs 575.

Neither the master nor defendants offer any explanation for this about-face, and an examination of the record discloses none, other than the fact that in the meantime defendants made four secret cash payments to the master aggregating $20,000. These payments were made on the following dates and in the following amounts—2 abs 568:

June 7, 1961 — $5,000	Nov. 13, 1962 — $5,000
May 4, 1962 — $5,000	Jan. 14, 1963 — $5,000

Although the master in his certificate of fees and charges attached to his reports filed December 18, 1963 claimed to be entitled to fees aggregating $40,956.70 he did not disclose that he had received from defendants the four secret payments aggregating $20,000 and apparently did not intend to disclose to Lahman or Lahman's attorneys or the court this fact. 2 abs 70.

It was not until February 24, 1964 that Lahman and his attorneys first learned that defendants had made secret payments to the master, and it was not until March 5, 1964 that they were able to learn the dates and amounts thereof. 2 abs 482, 496, 497, 531, 534.

On February 4 and 5, 1964 Lahman's exceptions to the master's reports were heard by the chancellor and the chancellor requested both sides to submit proposed findings and decrees by February 26, 1964. 2 abs 481, 518, 532.

Following December 18, 1963 Lahman and his attorney Raymond Harkrider had discussions in which Lahman expressed amazement as to why the master ignored so much of the evidence favorable to him and went so far out of his way to hurt Lahman and help defendants. 2 abs 511. Right after December 19, 1963 Lahman expressed to Harkrider that he had a feeling that the master had

been reached and insisted that Harkrider make an inquiry. 2 abs 512, 513.

The circumstance that the proposed findings and decree requested by the chancellor, which were to be filed February 26, 1964, would contain provisions relating to master's fees afforded Harkrider a reason for broaching that subject to the master. On February 24, 1964—two days before the proposed decree was to be submitted to the chancellor—Harkrider verbally inquired of the master whether he had received any payments on account of his fees and the master indicated he had, but did not volunteer any details as to the amounts or dates of payments. Harkrider verbally requested the master to provide him with the details. 2 abs 482. On February 28, 1964 Harkrider, not having heard from the master, wrote the master requesting the same information. 2 abs 482. By March 3, 1964 the master had not yet responded to Harkrider's requests, and on that date Harkrider sent a letter to the chancellor which stated among other things that the master had been requested to provide the details as to any payments or deposits he had received, and sent a copy to the Winston firm who were then representing defendants in these proceedings. 2 abs 482. On March 5, 1964 the master telephoned Harkrider and informed Harkrider that the master had received from defendants the four $5,000 payments hereinabove mentioned.

Lahman promptly on March 11, 1964 filed his verified petition in the trial court—2 abs 479-85, in which he prayed:

1. That, excepting only insofar as the master certified the transcript of testimony containing 3,906 pages and exhibits offered and received before him, the master's reports be wholly suppressed and for naught held, and entirely disregarded by the chancellor in making his findings, conclusions, orders, judgments and decrees herein;
2. That the chancellor proceed to make findings and conclusions and enter appropriate orders, judgments and

decrees herein on the basis of the transcript and exhibits entirely uninfluenced by any findings or conclusions of the master;

3. That, excepting only his statutory fees amounting to $956.70, the master be disallowed fees for service rendered on the reference herein; and

4. That defendants and each of them be found guilty of impeding and interfering with the due and impartial administration of justice.

And Lahman asked for such further and other relief as to the chancellor seemed proper.

On appeal to the Illinois appellate court Lahman asked for substantially the same relief as he asked in the trial court. 1 abs 137, 138.

On April 8, 1964 Lahman's petition to suppress the master's reports was heard by the chancellor. The master, in attempted justification of the secret payments aggregating $20,000, testified that on an occasion of a hearing in his office Abraham, who was then representing defendants in these proceedings, agreed that defendant loan company would—2 abs 499:

> "guarantee the payment of the master's fees, and the master may have a deposit any time he likes."

The master further testified—2 abs 500:

> "Mr. Abraham said that his clients would guarantee my master's fees and costs."

The master further testified that the first $5,000 check was delivered to him by Abraham on June 7, 1961—2 abs 500, 501, and that when he requested the second $5,000 check on or about November 13, 1962 Abraham said—2 abs 501:

> **"From now on you don't have to bother with me, just call Mr. Grant [an officer of the loan company] and he will make the necessary deposits."**

The master further testified that thereafter when he wanted additional payments he contacted Grant personally. 2 abs 501. Grant deposed that he made the four $5,000 payments to the master, the first after request

therefor from the master relayed through Abraham, and the last three pursuant to request directly by the master. 2 abs 488.

The master further testified he did not disclose to Lahman or his attorneys the fact he had received from defendants the four secret payments aggregating $20,000. 2 abs 502, 503.

The master was unable or unwilling to fix the date on which defendant loan company guaranteed to pay his fees and charges. He testified he did not remember—2 abs 199:

> "* * * whether it was within the first year, the first two years, the first three years or the first four years after the hearings commenced. I would say definitely it was within the first five years."

The record does not show whether the loan company in accordance with its guarantee has paid the master the remaining $20,000 of the $40,000 in fees claimed by him.

Both Lahman and attorney Kutner, who until about the middle of November 1960 represented Lahman in these proceedings, testified that they did not until March 1964 learn of the loan company's undertaking to guarantee the master's fees. 2 abs 504, 505, 509, 511.

May 27, 1964 defendants submitted to the chancellor suggested form of order to be entered in respect of Lahman's petition to suppress master's report in which they specifically requested the chancellor to find—Lahman's appellate court reply brief, appendix v:

> "The court specifically finds from the evidence that counsel for both parties had agreed before the master that deposits could be made by defendants without obtaining an order of court * * *"

The chancellor refused to make this finding. Lahman's appellate court reply brief, appendix vi-viii.

Thus throughout the crucial decision-making period while Lahman's rights were before the master for adjudi-

cation, the master was in effect on defendants' payroll. He stood in the position of a paid employee of the loan company with a *"guarantee"* by the loan company that the loan company would pay all his fees.

Obviously the master did not possess the necessary qualifications of impartiality and fairness to pass on Lahman's rights. There is a "general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side." *City of Naperville* v. *Wehrle* 340 Ill 579, 582.

Moreover the master would be reluctant to render a decision adverse to defendants which might well take from defendants the assets they need to honor their verbal *"guarantee"* to pay all the master's fees.

The master's findings and conclusions are tainted with prejudice and partiality, both in fact and in law, in favor of his benefactors and against Lahman.

Lahman presecutes these proceedings to redeem or recover his shares in Interlake and shares in Frantz not only for the benefit of himself or his estate but also for the benefit of his creditors. Substantial amounts of Lahman's indebtedness to others can be traced to the unconscionable and shocking charges which Gould and his loan company exacted from Lahman and Interlake for the use of money, which in some instances amounted to more than 3,650% per year and aggregated $138,724.21. 1 abs 288. see infra pp 30 to 35.

Substantial amounts of Lahman's indebtedness to others can be traced directly to the May 29, 1950 arrangement under which Lahman undertook to pay unsecured creditors of Interlake and to turn over to the loan company 100% of the shares in Interlake although 25 preferred shares were held by Ronin, 250 preferred and 500 common shares were held by the Emmerts and 1,000 common shares were held by the Brubakers. see infra pp 51, 52.

Admittedly the Lahman estate does not have any assets of value other than the equitable right to redeem Lahman's shares in Interlake and his shares in Frantz on payment to the loan company of the amount found due after an accounting on equitable principles.

Unless Lahman's estate is permitted to exercise this equity of redemption creditors of Lahman will remain entirely unpaid while the loan company—another creditor—will not only be paid in full but will be greatly overpaid.

Such a result is extremely inequitable, constitutes an obnoxious preference of one creditor over others, and is contrary to the principle that redemptions are favored so that a debtor's assets will satisfy as many creditors as possible.

To be adversely affected by the tainted findings and conclusions of a judicial officer paid by the opposition as are Lahman and his creditors in the present setting of these proceedings, constitutes a denial of procedural due process of law guaranteed by the due process clause of section 1 amendment XIV of the United States constitution.

In order for Lahman and his creditors to have had a fair hearing before the chancellor which would satisfy the requirements of procedural due process of law it was incumbent on the chancellor, as Lahman requested, to suppress the master's reports and to proceed to make findings and conclusions and adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in the record, entirely uninfluenced by the tainted findings and conclusions of the master. This the chancellor did not do, but on the contrary he approved the master's report and "based on that report" proceded to adjudicate the rights of the parties—2 abs 585, and on February 17, 1965 entered two orders and final decree adverse to Lahman—2 abs 581-85, from which Lahman appealed to the Illinois appellate court and the appeal was assigned no. 50611.

Thus under the orders or decrees entered by the chancellor Lahman and his creditors are adversely affected by the tainted findings and conclusions of the master and deprived of procedural due process of law.

In order for Lahman and his creditors to have had a fair hearing in the Illinois appellate court which would satisfy the requirements of procedural due process of law it was incumbent on that court, as Lahman again requested, to proceed to ascertain the facts and rights of the parties on the basis of the record before the court, entirely uninfluenced by the findings and conclusions of the master or of the chancellor. This the appellate court did not do, but on the contrary gave full credence and effect to the findings and conclusions of the master and the chancellor and by its decision rendered April 18, 1967 held Lahman is bound by those tainted findings and conclusions unless he can show they are manifestly against the weight of the evidence. Thus the appellate court said 82 Ill App 2d at 230; appendix 12:

> "Plaintiff, in effect, is asking this court to substitute our judgment in place of the findings of the master and of the trial court. *That is something this court should not do unless the findings of the master are manifestly against the weight of the evidence.* Rose v. Dolejs, 1 Ill 2d 280, 116 NE 2d 402; Punzak v. Delano, 11 Ill 2d 117, 142 NE 2d 64; Gallagher v. Girote, 23 Ill 2d 170, 177 NE 2d 103." (emphasis added)

Thus under the decision of the Illinois appellate court Lahman and his creditors are adversely affected by the tainted findings and conclusions of the master and deprived of procedural due process of law.

On June 19, 1967 appellant filed in Illinois supreme court petition for leave to appeal from the judgment of the appellate court which proceedings were assigned no. 40733.

On September 26, 1967 the Illinois supreme court denied the petition for leave to appeal. appendix 17.

On October 16, 1967 appellant filed in Illinois supreme court in cause no. 40733 motion for reconsideration of her petition for leave to appeal.

On November 8, 1967 Mrs. Jesse T. Emmert and Howard O. Stone, two substantial creditors of Lahman, filed in Illinois supreme court in cause no. 40733 motion to be made parties to these proceedings and for reconsideration of order denying petition for leave to appeal.

On November 21, 1967 the Illinois supreme court entered orders denying appellant's motion of October 16, 1967—appendix 17—and the Emmert-Stone motion of November 8, 1967.

Thus Lahman and his creditors still are adversely affected by the tainted findings and conclusions of the master—a judicial officer who was in effect on the payroll of defendant loan company—and, as shown by the authorities hereinafter cited, have been deprived of procedural due process of law guaranteed by the due process clause of section 1 amendment XIV of United States constitution.

In *Tumey* v *Ohio* 273 US 510 71 L ed 749 1927 United States supreme court granted certiorari to supreme court of Ohio and reversed. Petitioner had been found guilty by a village judge of violating prohibition law, which judge was entitled to court costs as remuneration.

Taft c j at 532:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

At 535:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the

judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge."

Ex parte Hatem 38 2d 226 CCA 6th 1930 certiorari denied 282 US 887 75 L ed 782 was similar to *Tumey* v *Ohio* 273 US 510 71 L ed 749 1927 except that the justice of the peace stated the case could not be tried unless costs were secured whereupon the constable and a state prohibition agent signed a document guaranteeing costs in case the complaint was dismissed. The circuit court of appeals held this guarantee did not make the justice of the peace impartial.

Per curiam at 227:

"The interest of the presiding justice of the peace, founded upon the fact that his only compensation consists of costs collected, which are not paid by the state in event of acquittal, would not seem to be destroyed by the undertaking of an officer of his own court, even though financial responsibility were shared by a state prohibition enforcement agent. Whether constitutional objection would be removed were complaint made and bond given by one wholly disconnected with the magistrate's court, we need not here and now decide. It is sufficient that these officers were connected with the court, that no bond was required of them by statute, and that, by bringing their cases in that court, they served to increase an otherwise lower earning capacity of the magistrate. The bond was obviously required only to provide a colorable means of avoiding the effect of the Tumey Case. It is not therefore irrational to assume that the bond was given as by a friendly volunteer, by whom no ultimate liability was contemplated, and upon whom the justice of the peace might well hesitate to impose such liability for a kindly act of evasion."

In *Re Murchison* 349 US 133 99 L ed 942 1955 United States supreme court granted certiorari to review judgments of supreme court of Michigan and reversed. As to what constitutes a fair tribunal for purposes of due process the United States supreme court said at 136:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 US 510, 532, 71 L ed 749, 758, 47 S Ct 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 US 11, 99 L ed 11, 75 S Ct 11."

In re Heirich 10 Ill 2d 357 1957 involved disbarment proceedings against an attorney. It appeared that one of the commissioners who heard the case was member of a law firm that represented several members of the Association of American Railroads which association financed the disbarment proceedings. Although the recommendations of the commissioners were advisory only [p 363] the court overruled the report of the commissioners and discharged the attorney saying at 384:

"We agree that respondent was entitled to be tried before a tribunal that was completely disinterested in the subject matter and that it would have been appropriate for the commissioner to have disqualified himself.

"In so doing, we need not in law, nor do we in fact, hold or intimate that this particular commissioner was infected, consciously or unconsciously, with prejudice or affected by other motivation against respondent.

"It is a classical principle of jurisprudence that no man who has a personal interest in the subject matter of decision in a case may sit in judgment on that case.

"The principle is as applicable to administrative agents, commissioners, referees, masters in chancery, or other arbiters of questions of law or fact not holding judicial office as it is to those who are technically judges in the full sense of the word."

At 385:

"For the guidance of this court's commissioners in future cases and of all other persons required to find facts or apply law in adversary proceedings, judicial or administrative, we hold that when such an arbiter has a financial interest in the subject matter, even though he personally be a man of the most fastidious probity, it is his duty to recuse himself. He must do so if challenged.

"The record shows that one of the commissioners who was asked to recuse himself refused to do so, notwithstanding the fact that his law firm represented several railroads who were members of the association that financed and directed the prosecution of these proceedings."

In *City of Naperville* v *Wehrle* 340 Ill 579 1930 the city of Naperville instituted special assessment proceedings for local improvements. Myers, one of the three commissioners appointed to report on compensation for property taken or damaged and to assess benefits, was secretary of a school district which owned land subject to being assessed for benefits. Myers received financial compensation for acting as secretary of the school district. The court held that Myers was not a competent and disinterested commissioner and his participation infected the action of the whole body.

As to the effect of a judicial officer receiving compensation from a party to the litigation the court said at 582:

"'* * * Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and

therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) [583] who was quite positive that he had no bias and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties bias is implied and evidence of its actual existence need not be given.' (*Crawford* v *United States,* 212 U.S. 183.) Other cases illustrative of the same principle are *AEtna Ins. Co.* v *Stevens,* 48 Ill. 31, *Hufnagle* v *Delaware and Hudson Co.* 227 Pa. 476, 76 Atl. 205, *Pearce* v. *Quincy Mining Co.* 149 Mich. 112, 112 N.W. 739, *Block* v *State,* 100 Ind. 357, *Stumm* v *Hummel,* 39 Iowa, 478, *Central Railroad Co.* v *Mitchell,* 63 Ga. 173, and *Hubbard* v *Rutledge,* 57 Miss. 7.

"That a commissioner whose duty it was to assess benefits against the property of the corporation of which he was an officer and from which he was receiving compensation was neither 'competent' nor 'disinterested' would seem too clear, in the light of the above principles, to require discussion."

In *Payne* v *Lee* 222 Minn 269. 24 NW 2d 259 1946 the court said at 275:

"The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of U.S. Const. Amend. XIV. Buck v. Bell, 143 Va. 310, 130 S.E. 516, 51 A.L.R. 855; Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185. In the latter case the Iowa supreme court said (187 Iowa 1352, 175 N.W. 776): 'The constitutional guaranties recognize as a primal necessity that there be laws providing impartial tribunals for the adjudi-

cation of rights.' See 3 Willoughby, Constitution of the United States, 2d Ed. § 1124; 12 Am. Jur., Constitutional Law. § 635."

—(b)(ii)—Dates of judgments sought to be reviewed, date of order respecting rehearing, date and place of filing notice of appeal—Appellant seeks to review the following orders, judgments or decrees—appendix 17:

1. Judgment or decree entered April 18, 1967 by appellate court of Illinois first district in its appeal no. 50611 which affirmed three orders or decrees of circuit court of Cook county Illinois;

2. Order or judgment enfered September 26, 1967 by supreme court of Illinois in its cause no. 40733 denying appellant's petition for leave to appeal; and

3. Order or judgment entered November 21, 1967 by supreme court of Illinois in its cause no. 40733 denying appellant's motion for reconsideration of her petition for leave to appeal etc.

On May 5, 1967 Lahman filed in the Illinois appellate court in its appeal no. 50611 a petition for rehearing and on May 16, 1967 the appellate court denied such petition.

On December 4, 1967 appellant filed notice of appeal in appellate court of Illinois first district and on December 5, 1967 appellant filed notice of appeal in supreme court of Illinois.

—(b)(iii)—Statutory provisions conferring jurisdiction—The statutory provision conferring on the court jurisdiction of this appeal is §1257(2) 28 US Code which reads:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the supreme court as follows:
>
> • • • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

A rule of court is a "statute" within the meaning of §1257(2) of 28 US Code. *North Avenue Bldg. Ass'n* v *Huber* 286 Ill. 375, 383 (1919); *Marcus* v *Property Search Warrant* 267 US 717, 721, 6 L ed 2d 1127 (1967); *Lathrop* v *Donohue* 367 US 820, 824, 6 L ed 4191 (1961)

Where as here objection is made to the application or enforcement of a rule of court or statute on the ground of its being repugnant to the United States constitution and the state courts overrule such objection and sustain the rule or statute, this court has jurisdiction by appeal under §1257(2) of 28 US Code. *Hanover Fire Ins. Co.* v *Carr* 272 US 494, 509, 71 L ed 372 (1926); *Lovell* v *Griffin* 303 US 443, 450, 82 L ed 949 (1938); *Jamison* v *Texas* 318 US 413, 414, 87 L ed 869 (1943); *Illinois* v *Board of Education* 333 US 203, 206, 92 L ed 649 (1948); *Michigan-Wisconsin P. L. Co.* v *Calvert* 347 US 157, 159, 98 L ed 584 (1954); *Walker* v *Hutchinson* 352 US 112, 115, 1 L ed 2d 178 (1956); *Marcus* v *Property Search Warrant* 267 US 717, 721, 6 L ed 2d 1127 (1961); *Lathrop* v *Donohue* 367 US 820, 824, 6 L ed 1191 (1961).

—(b)(v)—Statute whose validity is drawn in question— The validity of rule 9.3 of rules of the circuit court of Cook county Illinois is drawn in question on the ground of its being repugnant to the constitution of the United States. *Ill Rev Stat* 1965 ch 110 §309.3.

Pertinent portions of rule 9.3 read:

> *(a)—Deposits and stipulations*—Before the disposition of all objections to his report, the master shall not request or accept from any party or attorney any stipulation as to the amount of the master's fees. Before the taxation of his fees, the master shall not request or receive any deposit or payment for his services upon the reference except:
>
> (i) upon approval by the court; or
>
> (ii) for accrued fees for the taking and reporting of testimony at the statutory rate and for taxable stenographers fees.
>
> • • • • •

(d) Disallowance—The court in its discretion may disallow master's fees in whole or in part in respect to any improper proceedings occasioned by the fault of the master.

Concerning these provisions of rule 9.3 the Illinois appellate court said 82 Ill App 2d at 233; appendix 15:

"From a reading of the above provisions it is clear that they do not provide for the suppression of the report because of irregularities in making payments to the master. *The most that could have been done under the circumstances and provisions of the rules of the Circuit Court was the taking away of all fees earned by the master and that was a remedy available to the court in all cases. The remedy of suppression is not given.*" (emphasis added)

Again the appellate court said at 235; appendix 16:

"*The only remedy provided by the statute* [rule 9.31] *is for reduction or disallowance of the master's fees.*" (emphasis added)

The Illinois appellate court thus held that circuit court rule 9.3 provides for the disallowance of master's fees as the exclusive remedy and by implication excludes the remedy of suppression for wrongful conduct of the master. Under such construction of the rule a master's report can never be suppressed even for the degree of culpability that exists in this case.

While the Illinois appellate court properly held that the acceptance by the master from defendants of the four secret payments aggregating $20,000 was wrongful, the appellate court clearly erred in holding that in order to suppress the master's report Lahman affirmatively had to prove prejudice or partiality on part of the master.

This imposed on Lahman a very difficult if not impossible task—an unconstitutional burden—and deprived him of procedural due process of law guaranteed by section 1 amendment XIV of United States constitution.

(c)—Questions presented by this appeal

The question is presented by this appeal whether appellant is entitled for various reasons to recover from defend-

ant loan company by way of redemption, restitution or constructive trust all shares in Interlake, Lahman's 117.2 shares in Frantz or new shares which represent those 117.2 shares, and to recover from the loan company damages for loss of income and earning power and for costs and expenses incurred by reason of the wrongful acts and conduct of Gould and his loan company.

As the proceedings now stand the Illinois courts have held that Lahman is bound by findings and conclusions adverse to his interests made by a master who, throughout the crucial decision-making period while Lahman's rights were before him for adjudication, was in effect on defendant loan company's payroll and stood in the position of a paid employee with a *"guarantee"* that the loan company would pay all his fees pursuant to which the master received four secret payments aggregating $20,000.

The question is presented by this appeal whether Lahman has thus been deprived of procedural due process of law guaranteed by section 1 amendment XIV of the United States constitution.

Apart from statute or rule of court a litigant, without the necessity of proving prejudice or partiality, has the remedy of suppression of the master's report where, as here, the master improperly accepts secret payments from the opposition while the case is pending before him, which remedy is afforded by public policy, fairness and procedural due process of law guaranteed by section 1 amendment XIV of United States constitution.

Fitchburg Steam Engine Co. v *Potter* 211 Ill 138 (1904) Fitch j at 150 quoting from the New York case of *Dorlon* v *Lewis* 9 How Pr 1:

> "'It may have had its effect without his [the referee] being conscious of it. Such a thing is at least possible, and that, upon the principle already stated, is enough to justify the court in setting aside the report.'"

As indicated in the *Dorlon case,* New York has a referee system similar to the Illinois master in chancery system

where the compensation of the referee is payable by the litigants. 2 abs 561-65.

Ament v *Schubert Piano Co.* 172 App Div 423, 158 N Y S 532 (1916)

Page j at 425:

"The request of the referee for security put the plaintiff in an embarrassing and disadvantageous position. While it may be that the referee was not influenced by the refusal of the plaintiff to give the security demanded, although the defendant offered to give the security if the plaintiff would, it cannot be said that others may not fairly doubt it. No such doubt should be allowed to exist in the absolutely fair and unbiased judgment of a judicial officer. (*Smith* v *Dunn,* 94 App Div 429, 437; *Topia Mining Co.* v *Warfield,* 145 id 422) The demanding and receiving his fees prior to the completion of his decision was even more reprehensible. It is well settled that under ordinary circumstances a referee's right to his fees does not accrue until he has completed the reference and filed or delivered his report. (*Hebard* v *City of New York,* 137 App Div 752) He should not have requested nor accepted payment as long as there remained any duty of a judicial nature for him to perform."

Miles Laboratories v *American Pharmaceutical Co.* 261 App Div 108, 24 N Y S 2d 405 (1941)

Martin p j at 113:

"It is not necessary that actual corruption on the part of a referee be shown. Indiscreet action on the part of a referee from which improper inferences may be drawn is sufficient to warrant setting aside his report. (*Reynolds* v *Moore,* supra) It is unfortunate that the parties should be subjected to the expense of a new trial in which the result may be no different, but, as was pointed out in *Greenwood* v *Marvin* (supra), it is better that there be expense and delay than that there be improper precedents.

"In *Dickinson* v *Earle* (supra) this court said: 'We have to care for the public interest in the administration of justice as well as the protection of the rights

of the individual suitor, and the performance of this duty requires us to see to it that no judgment based upon the report of a referee guilty of the misconduct here disclosed should stand as a judgment of the court.'

"In *Greenwood* v *Marvin* (29 Hun, 99) the court said: 'The policy of the law in guarding judicial trials from evil and the appearance of evil as well, require that such conduct as has been disclosed should be condemned, and that a report following such conduct should be set aside and the parties remitted to another trial. [citing cases.]

"'Confidence in the purity of the administration of the law cannot be maintained if such conduct be tolerated, and reports are allowed to stand, made by referees who start negotiations and stipulations for extra statutory fees, after a case has been submitted to them. * * *

"'Referees ought, like jurors, to be vigilant to avoid evil, to avoid taking a line of conduct which may affect their freedom [114] of mind and neutrality in the cases under consideration. *Ex parte* treaties and conversations with either party as to any fact, point or fee ought to be avoided. Suitors have a right to an unbiased tribunal approaching the delicate duty of determining the facts and law of a case, uninfluenced by any solicitude or efforts to secure extra fees.'"

As above stated the Illinois appellate court held that circuit court rule 9.3 provides for the disallowance of masters' fees as the exclusive remedy and by implication excludes the remedy of suppression for wrongful conduct of the master and barred Lahman's right to have the master's report suppressed with the result that Lahman is bound by the tainted adverse findings and conclusions of the master.

The Illinois supreme court refused to grant Lahman any relief against this decision of the Illinois appellate court.

The question is presented by this appeal whether circuit court rule 9.3, whose validity is drawn in question, as thus construed and applied by the Illinois courts deprives

Lahman of procedural due process of law guaranteed by section 1 amendment XIV of United States constitution.

See also authorities cited above at pages 11 to 15 and authorities cited at 2 abs 559-65.

(d) Statement of the case

—Stages in proceedings and manner in which the federal questions were raised—On March 11, 1964, promptly on learning the master had received from defendant loan company the four secret payments aggregating $20,000, Lahman filed his verified petition in the trial court to suppress the master's reports and for other relief. 2 abs 479-85.

In paragraph 35 of his petition to suppress Lahman alleged that for the chancellor or any court to give any effect or significance whatsoever to the findings or conclusions of the master would deprive Lahman of procedural due process of law guaranteed by various provisions of the Illinois and federal constitutions including section 1 amendment XIV of United States constitution. 2 abs483.

In brief filed in trial court in support of his petition to suppress the master's reports Lahman contended—2 abs 565:

> "The due process clauses of the federal and state constitutions guarantee a litigant a fair and impartial tribunal."

In the chancellor's final orders and decree entered February 17, 1965 the chancellor overruled Lahman's constitutional and other objections, refused to suppress the master's reports, and, on the contrary, approved the same and "based on said Master's Report" proceeded to adjudicate the rights of the parties. 2 abs 581-85.

In his notice of appeal from the trial court to Illinois appellate court Lahman contended that the appellate court should proceed to consider this cause on the transcript of testimony and the exhibits and make findings and

conclusions and enter appropriate orders, judgments decrees herein on that transcript and those exhibits entirely uninfluenced by any findings or conclusions of the master. 2 abs 138.

In Lahman's brief filed in the Illinois appellate court which is included in the record filed in this court Lahman contended at page 75:

> "The due process clauses of the federal and state constitutions guarantee a litigant a fair and impartial hearing before a fiar and impartial tribunal."

The Illinois appellate court overruled Lahman's constitutional objections and for the first time in these proceedings held that rule 9.3 of rules of circuit court of Cook county Illinois provides for the disallowance of master's fees as the exclusive remedy and by implication excludes the remedy of suppression for wrongful conduct of the master. Consequently the appellate court not only refused to suppress the master's report but also held that Lahman is bound by the tainted findings and conclusions of the master unless he can show they are "manifestly against the weight of the evidence." 82 Ill App 2d at 230; appendix 12.

In Lahman's petition for leave to appeal to Illinois supreme court filed June 19, 1967 Lahman contended at page 9 that the remedy of suppression of the master's report for accepting secret payments from defendant loan company "is afforded by public policy, fairness and due process of law which guarantees a litigant a fair and impartial hearing before a fair and impartial tribunal" and at page 91 Lahman contended that rule 9.3 of rules of circuit court of Cook county Illinois as applied and enforced by the Illinois appellate court is unconstitutional as violative of the due process clause of section 1 amendment XIV of United States constitution.

On September 26, 1967 the Illinois supreme court considered the petition for leave to appeal and denied the same. appendix 17.

In the motion filed in Illinois supreme court October 16, 1967 for reconsideration of petition for leave to appeal Lahman entended he had been deprived of procedural due process of law guaranteed by section 1 amendment XIV United States constitution and that rule 9.3 of rules of circuit court of Cook county Illinois is invalid as applied by the Illinois appellate court in this case by reason of repugnancy to the due process clause of that section.

On November 21, 1967 the Illinois supreme court considered the motion for reconsideration of petition for leave to appeal and denied the same. appendix 17.

—The material facts

The facts material to the consideration of the questions involved are not adequately or correctly stated in the Illinois appellate court opinion and will be stated here.

—Concerning the parties involved

Lahman, born April 30, 1900, resided in Chicago, Illinois, almost continuously from September 1952 until his death, February 9, 1967. From 1922 until 1952 he was associated with the Frantz company in various capacities and during this period was a substantial shareholder in Frantz. 4 abs 2; 2 abs 158, 159.

Frantz is an Illinois corporation founded in 1909 and since then has been engaged in the manufacture and sale of builders hardware, overhead garage doors and other items with its principal plant and place of business in Sterling, Illinois. Until November 1959 when its shares were split 176 for 1 and placed on the market at $15 per share, the shares in Frantz were closely held by two families, one of which was the Lahman family of which Lahman was a member. 4 abs 2, 7, 613-15; 2 abs 158.

During his 30 years with the Frantz company Lahman lived in Sterling with his wife and family. 4 abs 3, 7, 618; 2 abs 158.

Gould was born in about 1868 and from about 1889 to 1899 he was engaged in the banking business at Toulon, Illinois, and from about 1899 to 1927 he was engaged in the banking and loan business in Kewanee, Henry county, Illinois. The bank was known as the Savings Bank of Kewanee and the loan business was transacted under the name Fischer, Gould & Burge. 4 abs 170, 291; 2 abs 154, 155.

In connection with his banking and loan business in Kewanee, in the late nineteen twenties Gould was indicted and sued civilly for various crimes and frauds, some of which are reflected in the opinions of the Illinois supreme and appellate courts in *People* v *Gould* 345 Ill 288 (1931); *People* v *Gould* 347 Ill 298 (1932); *People* v *Gould* 363 Ill 348 (1936); *Huffman* v *Gould* 327 Ill App 428 (1945, 2d) leave to appeal denied 331 Ill App xiv. 2 abs 91-94, 155.

Lahman did not learn until about April 4 or 5 of 1955 anything about Gould's criminal or fraudulent past. About three weeks thereafter in early May 1955 he first consulted a lawyer concerning his claim against Gould and the loan company and on May 16, 1955 commenced these proceedings. 4 abs 621; 2 abs 155.

In about 1928 Gould left Kewanee, came to Chicago and opened a loan office at 39 South La Salle Street and engaged in loaning money at high rates of interest. He transacted this loan business as an individual under the name of W. E. Gould and Company until about 1937 when he incorporated defendant loan company to take over and carry on that business. Since about 1937 the loan company engaged in loaning money at high rates of interest with its office at 39 South La Salle Street, Chicago. 4 abs 169, 335; 2 abs 156, 157.

Mrs. Gould married Gould in about 1902. From 1928 until about 1954 she worked in the loan company's office doing stenography and other things, such as making entries in books and records and typing collateral notes etc. 4 abs 336, 338; 2 abs 157.

During Gould's lifetime the shares in the loan company were held about 50% by Gould and 50% by Mrs. Gould. The loan company had three directors and they were Gould, Mrs. Gould and Eleanor Grant, a daughter. Its officers were Gould, president and treasurer, and Mrs. Gould, secretary. 4 abs 235, 372; 2 abs 157.

Gould died testate December 21, 1958 and appointed Mrs. Gould executor of his will and on January 13, 1959 the court entered an order in these proceedings substituting Mrs. Gould, as executor, defendant in lieu of Gould, deceased. px 230; 1 abs 216.

Although Gould was 80 years of age or over at the time of the transactions involved in these proceedings—which covered the period from February 1945 until the commencement of these proceedings May 16, 1955—his acquaintances and business associates, including Mrs. Gould, testified that he had a sound mind and memory, was alert, had a very good and excellent memory and was in good physical health. 4 abs 328, 342; 2 abs 95, 96, 157.

At the time of the transactions involved in these proceedings Gould was the active directing head of the loan company, formulated its policies, and decided the terms and conditions of the loans. He personally handled the loan company's transactions, hereinafter referred to, with Lahman, Interlake and those involving Lahman, Inc. 4 abs 170, 180; 2 abs 157, 158.

Lahman't father, Clarence W. Lahman, was a minister in The Church Of The Brethren, at Franklin Grove, Illinois, which was originally known as the German Baptist Brethren. Lahman was born in Franklin Grove and spent his childhood there. He was brought up in The Church Of The Brethren, was pretty well indoctrinated as a boy and continued to be an adherent to the views of that church until his death. 4 abs 138, 139; 2 abs 159.

Lahman by nature and because of his beliefs in the views of The Church Of The Brethren—2 abs 164, 165—

was a trusting and unsuspecting person, with scruples against resorting to law to enforce his rights, and his religious beliefs and characteristics influenced his relationships and dealings with others, both social and business, and particularly with Gould and the loan company. From February 1945 on Gould had full knowledge of Lahman's religious beliefs and of his trusting and unsuspecting nature. 4 abs 62, 138; 2 abs 164, 165.

Apart from his associations with Frantz and the Interlake project hereinafter referred to, Lahman's principal business activity was the manufacture of silica gel during World War II at Joliet, Illinois. In about 1944 Lahman was one of several who risked capital in this temporary wartime endeavor. In 1946 he disposed of his interests in the silica gel project at an initial substantial profit, but this initial profit was later substantially reduced by price redetermination and profit renegotiation. Lahman also made investments in a few listed stocks and a few other businesses and was a director of some corporations, but he participated actively in the management of only Frantz, Interlake and the silica gel project. 4 abs 606; 2 abs 159-63.

Gould first met Lahman in October or November of 1944. Lahman and his associates in the silica gel project needed additional capital and in October or November of 1944 Gould went to their offices in Joliet and Gould became acquainted with Lahman and his associates. At that time Lahman's income was about $30,000 per year, at the end of 1944 his net worth was approximately $100,000, and he was an expectant heir of his father on whose death he would inherit property of substantial value, including shares in Frantz. 4 abs 2, 3, 13, 14, 28; 2 abs 163.

Promptly upon meeting Lahman, Gould began to ingratiate himself with Lahman and to promote loans and other deals for his loan company. To this end Gould frequently visited Lahman in Joliet and also at Sterling, where Lahman showed Gould through the Frantz plant.

Gould became very congenial and friendly with Lahman and frequently discussed religion with him, including the religious beliefs and practices of The Church Of The Brethren. 4 abs 6, 8, 62, 111; px 1, 2, 3, 5, 6, 12, 74; 1 abs 140-42; 2 abs 108, 109, 164-69, 192-97, 234-37, 244-46; 3 abs 374-75.

Shortly after Lahman met Gould in the fall of 1944 Lahman discussed with Gould Lahman's religion and the religious beliefs and practices of The Church Of The Brethren. 4 abs 62, 63. Gould told Lahman that Gould was a member of the Congregational Church and had been a superintendent of a Sunday School for about 20 years. 4 abs 162. Thereafter Gould made it a point frequently to discuss religion with Lahman. 4 abs 62, 162, 163. In addition to numerous verbal discussions, in March 1950 and again in April 1950 Gould wrote about religion and gave Lahman copies of his writings. px 44, 56; 2 abs 234-36, 244-46. From these discussions and writings Lahman was impressed that Gould was a deeply spiritual man and they influenced Lahman in placing confidence in Gould. 4 abs 162. Gould testified that by discussing religion with Lahman, Gould intended to indicate that Gould was a man of faith and belief. 4 abs 229; 2 abs 158, 159, 164, 234-37, 244-46.

Gould's efforts to promote loans and other deals with Lahman were highly successful. During the 10-year period commencing February 13, 1945—when the first loan was made—Gould and his loan company not only engaged in more than 200 loan transactions with Lahman or Interlake for which the loan company exacted unconscionable and shocking charges for commissions and interest, in some instances amounting to 3,650% per year, but also got possession of Lahman's shares in Interlake and his 117.2 shares in Frantz under the May 29, 1950 and June 26, 1951 arrangements which defendants now contend cut off and barred all interest of Lahman therein, including his equities or rights of redemption.

—The collateral note transactions

During the period from February 13, 1945 to April 1955 the loan company engaged in more than 100 loan transactions with Lahman or Interlake evidenced by collateral notes signed in the name of Lahman, Interlake or Lahman Inc. and sometimes in the names of Interlake and Lahman as co-signers. px 20, 22, 69, 211; 1 abs 161, 239-63; 2 abs 169.

Only about 44 of these collateral note transactions were transactions which consisted of new cash loans. The other collateral note transactions were transactions which consisted solely of renewals or extensions of principal or interest on prior notes, or of only relatively small amounts of new cash loans and substantial amounts of renewals or extensions of prior notes. px 69; 1 abs 161, 239-63; 2 abs 169, 170.

Some of the loans were evidenced by single notes but a very substantial number of the loans were evidenced by series collateral notes. The loan company provided printed forms of collateral notes with appropriate blank spaces which were filled in by employees of the loan company. Many of the collateral notes were in denominations of $1,000 or less, which would be of convenient size for resale by the loan company to customers. px 69; 1 abs 161, 239-63; 2 abs 170-75.

A specimen copy of the form of collateral note provided by the loan company and used in the loan transactions referred to is shown at 2 abs 172.

Under the collateral notes used in the loan transactions the collateral security listed therein became collateral security for the payment of any other obligations of Lahman or Interlake to the loan company, and such collateral notes did not give Lahman or Interlake any right to prepay principal before the stated maturity dates. 2 abs 109, 175, 176.

During the period from July 1948 to July 1957 the loan company endorsed over 200 of the collateral notes signed

in the name of Lahman, Interlake or Lahman Inc. aggregating more than $183,000 in face amount "without recourse" and sold them to the public at par. px 100, 101; 1 abs 161, 170; 2 abs 176-80.

As collateral security for the collateral notes, Lahman or Interlake transferred, pledged and delivered to the loan company, or to Gould "trustee", various securities, including Lahman's shares in Frantz and Lahman's shares in Interlake, promissory notes owned by Lahman, Lahman's life insurance, the agreement to purchase the Rockdale properties together with Lahman's guarantee thereof hereinafter referred to, leases covering areas in the Rockdale properties, Lahman's interest in his home in Sterling and other items. px 68; 1 abs 158-61, 239-63; 2 abs 181, 182.

With very few exceptions the loan company charged a commission on each loan transaction, whether it involved cash or only a renewal or extension of principal or interest on a prior note or notes or a combination of cash and renewals or extensions. The loan company added the commission to the amount of the loan and the face amount of the note or notes evidencing the transaction equaled the amount of the loan plus the commission. px 69; 1 abs 161-65; 2 abs 182, 183.

With very few exceptions the loan company charged interest at the rate of 6% per year on the full face amount of the note or notes from the date of the transactions, the effect of which was to charge 6% interest not only on the amount of the loans but also on the amount of the commissions. px 69; 1 abs 161-65; 2 abs 183.

—*Examples of high commissions exacted by loan company*

The commissions and interest which the loan company exacted in the collateral note transactions were unconscionable and shocking. Such commissions and interest in at least 20 instances amounted to more than 100% per year on the amount loaned; in at least 8 instances to more than 200% per year on the amount loaned; in at least 4 instances to more than 300% per year on the amount

loaned; in at least 3 instances to more than 400% per year on the amount loaned; in at least 2 instances to more than 500% per year on the amount loaned; and in 1 instance to more than 1,020% per year on the amount loaned. px 69; 1 abs 161-65; 2 abs 184.

The following are some of the more unconscionable and shocking collateral note transactions—px 20, 22, 69, 211; 1 abs 161-65; 2 abs 184:

Note no.	Date of loan	Amount of loan	Days outstanding	Commission	Per cent per year
506	6-18-45	$8,500	60	$2,000	147%
643	4- 1-46	1,000	180	1,000	206%
649	4-25-46	800	90	200	106%
701	7-18-46	300	120	300	306%
895	3-20-47	2,500	30	500	246%
1140	10-22-47	1,000	60	200	126%
1156	12- 1-47	3,081	90	1,019	138%
1435	6-15-49	2,682	90	700	111%
1455	7-23-49	2,000	30	200	126%
1531	10-18-49	5,000	20	500	189%
1533	10-31-49	5,000	30	500	126%
1558	11- 9-49	3,500	10	500	532%
1565	11-21-49	2,500	29	500	258%
1569	12- 5-49	2,000	15	200	249%
1668-1670	3-20-50	2,500	70	500	110%
1670-1671	4-13-50	1,000	18	500	1,020%
1684	5-11-50	2,500	30	1,000	493%
1900	3-16-51	5,000	30	500	126%
2085	10-30-51	1,100	30	100	117%
2291	8- 7-52	1,877	180	1,123	125%

During the period from February 15, 1945 to May 29, 1950 the average amount which the loan company had outstanding in respect of collateral notes signed in the name of Lahman or Interlake was $31,179.57, for which the loan company charged commissions aggregating $76,498.75, or at the rate of $14,464.95 or 46.4% per year, which, with the loan company's interest charge of 6% per year, amounted to 52.4% per year on the amount loaned. px 69, 102; 1 abs 161-65, 172; 2 abs 185.

During the period from July 20, 1950 to June 26, 1951 the average amount which the loan company had outstanding in respect of collateral notes signed in the name of Lahman or Lahman Inc. was $50,003.21, for which the

loan company charged commissions aggregating $26,100, or at the rate of $27,853.15 or 55.7% per year, which, with the loan company's interest charge of 6% per year, amounted to 61.7% per year on the amount loaned. px 69, 102; 1 abs 161-65, 172; 2 abs 185.

The loan company's charges for commissions in respect of the collateral note transactions aggregated $110,461.75 in addition to interest and extended over a period of 7½ years from February 13, 1945 to August 7, 1952. The commissions thus charged by the loan company were as follows during the periods indicated—px 69; 1 abs 161-65, 287, 288; 2 abs 185:

Period ending	Commissions charged during period	Cumulative commissions
Dec. 31, 1945	$ 5,100.00	$ 5,100.00
Dec. 31, 1946	2,200.00	7,300.00
Dec. 31, 1947	11,457.50	18,757.50
Dec. 31, 1948	11,490.50	30,248.00
Dec. 31, 1949	34,059.50	64,307.50
May 29, 1950	12,191.25	76,498.75
Dec. 31, 1950	11,000.00	87,498.75
Jun. 26, 1951	15,100.00	102,598.75
Dec. 31, 1951	4,140.00	106,738.75
Aug. 7, 1952	3,723.00	110,461.75

—The exchange check transactions

During the period from April 21, 1949 to May 6, 1952 Lahman found himself in extremely necessitous circumstances and needed funds immediately, principally in connection with the acquisition, rehabilitation and operation of the Rockdale properties and the organization and operation of Interlake and the payment of Interlake's creditors who he agreed to pay as part of the May 29, 1950 arrangement. 4 abs 76, 77, 90, 383; 2 abs 185, 186.

Gould took full advantage of Lahman's extremely necessitous circumstances and refused to loan Lahman the necessary funds on collateral notes, giving the excuse that Lahman did not have any more suitable collateral to put up with the loan company as security. However, Gould was quite willing to make short term loans to Lahman through the loan company averaging 4 or 5 days' duration

evidenced by exchange checks and during the period from April 21, 1949 to May 6, 1952 engaged in some 107 of such transactions. px 92; 4 abs 75-77; 1 abs 70, 171, 277-86.

In these exchange check transactions the loan company would give Lahman its check for, say $5,000, which Lahman could cash immediately and use the proceeds for some pressing need, and the loan company would take from Lahman his check for, say $5,500, dated and payable 4 or 5 days later. The $500 excess of Lahman's check over the loan company's check represented the loan company's commission charge for the loan of the $5,000 for 4 or 5 days. 4 abs 304, 305, 384; 1 abs 277-86; 2 abs 186.

At the time of these transactions Gould knew that Lahman did not have sufficient funds in the drawee bank to pay the checks but expected or hoped that Lahman would be able to obtain and deposit such funds within the 4 or 5 day period so his checks would be honored when presented. 4 abs 384; 2 abs 186.

These exchange check transactions repeatedly placed Lahman in the position where, in the 4 or 5 day period, he would have to raise from some source the funds necessary to honor his $5,500 check which he gave the loan company for a loan of only $5,000 for the short period of 4 or 5 days, and Lahman would obtain such funds from any source available, such as his salary or bonuses which he received from Frantz, dividends, and further borrowings from the loan company. 4 abs 80; 2 abs 186, 187.

In some instances Lahman would not pay his check but instead the loan company would include the amount thereof in a collateral note transaction. px 92; 1 abs 170, 171, 278, 280, 285, 286.

—More examples of high commissions exacted by loan company

The commissions which the loan company charged in the exchange check transactions were usurious, unconscionable and shocking. Such commissions in at least 80 instances amounted to more than 100% per year on the

amount loaned; in at least 75 instances to more than 200% per year on the amount loaned; in at least 45 instances to more than 500% per year on the amount loaned; in at least 17 instances to more than 1,000% per year on the amount loaned; in at least 6 instances to more than 2,737% per year on the amount loaned; in at least 5 instances to more than 3,241% per year on the amount loaned; and in at least 4 instances to more than 3,650% per year on the amount loaned. px 68, 92, 100, 101; 1 abs 277-86; 2 abs 187.

The following are some of the more unconscionable and shocking exchange check transactions—px 68, 92, 100, 101; 1 abs 277-86; 2 abs 188:

Loan no	Date of loan	Amount of loan	Days outstanding	Commission	Per cent per year
(6)	10-24-49	$ 4,000	3	$ 200	608%
(7)	1- 9-50	7,000	4	500	657%
(10)	4-20-50	2,000	7	300	782%
(17)	7-24-50	2,000	1	75	1,371%
(19)	8-11-50	2,000	3	100	608%
(21)	8-28-50	2,500	3	200	973%
(26)	9-25-50	2,000	2	200	1,825%
(27)	9-29-50	4,000	4	400	912%
(28)	10- 6-50	4,000	1	100	912%
(29)	10-10-50	5,000	1	500	3,650%
(31)	10-31-50	5,000	3	500	1,216%
(34)	11-24-50	5,000	3	400	973%
(35)	11-27-50	5,000	1	500	3,650%
(36)	12- 4-50	2,000	3	100	608%
(37)	12- 5-50	5,000	6	500	609%
(39)	12-13-50	5,000	5	400	584%
(40)	12-21-50	1,000	5	75	547%
(41)	12-27-50	4,500	1	200	1,620%
(44)	1-11-51	900	4	100	1,011%
(45)	1-18-51	5,000	1	500	3,650%
(46)	1-23-51	4,000	6	400	615%
(47)	1-29-51	7,000	2	500	1,303%
(48)	2- 3-51	5,000	5	500	730%
(49)	2- 6-51	2,500	6	250	608%
(51)	2-14-51	15,000	1, 5	500	526%
(55)	3-12-51	5,000	1	500	3,650%
(56)	3-14-51	2,500	2	250	1,825%
(57)	3-19-51	6,000	1	100	605%
(59)	4- 7-51	2,500	3	250	1,217%
(60)	4-12-51	4,000	6	500	769%
(61)	4-20-51	4,000	5	500	912%
(63)	4-25-51	2,500	5	250	730%
(64)	4-30-51	3,000	4	200	605%

Loan no	Date of loan	Amount of loan	Days outstanding	Commission	Per cent per year
(69)	5-21-51	4,000	1	300	2,737%
(72)	5-29-51	5,000	1	100	730%
(73)	6- 1-51	2,000	1	100	1,825%
(74)	6- 4-51	4,500	1	400	3,241%
(78)	6-12-51	5,000	1	150	1,095%
(85)	7- 9-51	2,000	1	100	1,825%
(87)	7-18-51	2,500	2	100	730%
(95)	8- 8-51	6,000	2(NSF)	200	605%
(106)	4-16-52	1,000	7(NSF)	100	521%

During the 3-year period from April 21, 1949 to May 15, 1952 the average amount which the loan company had outstanding in respect of exchange check transactions was $1,623.29, for which the loan company charged commissions aggregating $20,170, or at the rate of $6,566.35 per year, which amounted to 404.5% per year on the amount loaned. px 92; 1 abs 170, 171, 277-86; 2 abs 188.

During that 3-year period such commissions aggregated $20,170 and were as follows during the periods indicated —px 92; 1 abs 170, 171, 277-86; 2 abs 188, 186:

Period ending	Commissions charged during period	Cumulative commissions
Dec. 31, 1949	$ 1,040	$ 1,040
May 29, 1950	1,500	2,540
Dec. 31, 1950	5,875	8,415
Jun. 26, 1951	9,400	17,815
Dec. 31, 1951	2,000	19,815
May 6, 1952	355	20,170

On July 24, 1951 and thereafter Lahman was unable to procure funds within the short time available to honor a few of the exchange checks aggregating about $22,400 in face amount and they were returned to the loan company by the drawee banks NSF. The face amounts of these NSF checks were later included in collateral notes executed by Lahman. The loan company did not return such NSF checks to Lahman but Gould retained them and kept them in a drawer of his desk in the loan company's office. px 68, 92; 1 abs 170, 171, 284-86; 4 abs 91; 2 abs 189, 190.

—Purposes of the loans

The purposes of the cash loans which the loan company made to Lahman and Interlake included the following:

financing the war time silica gel project in which Lahman was interested from 1944 to 1946—4 abs 111; favors to friends and acquaintances of Lahman—4 abs 25, 128; paying refunds to the U. S. following price redetermination of silica gel contracts—4 abs 114; acquiring shares in Frantz—4 abs 27, 127; acquiring the Lahman family farm near Franklin Grove, Illinois—4 abs 129; financing the Rockdale properties project—4 abs 53; paying obligations Lahman assumed under the May 29, 1950 arrangement—4 abs 76, 80, 82; and repaying the loan company for commissions which it exacted from Lahman and Interlake. 4 abs 8, 12, 25, 27, 53, 76, 80, 82, 111, 112, 127, 129; 2 abs 191, 192.

—The Rockdale properties and purchase thereof by Lahman

The Rockdale properties comprise about 26.24 acres of land improved with some 56 buildings containing 691,084 square feet of floor area suitable for light manufacturing or warehousing purposes located in Rockdale Illinois adjoining Joliet about 38 miles southwest of Chicago Illinois. 1 abs 177, 178.

Prior to 1944 the Rockdale properties were owned by private owners. In that year the U. S. acquired the properties for the department of Navy as a small-parts storage facility. During 1944 and 1945 the Navy constructed some 20 new buildings and other improvements thereon and improved and rehabilitated existing buildings. The aggregate amount paid by the U. S. for the land and existing buildings and improvements and for new buildings and improvements exceeded $2,600,000. px 144; 1 abs 178; 2 abs 197, 198.

In 1947 the Rockdale properties were declared surplus to the WAA and assigned to the regional director, Chicago, Illinois, for liquidation and disposal. px 144; 1 abs 178; 2 abs 198.

In the fall of 1947 the WAA assigned David T. Bjork, one of its valuation engineers, to make an appraisal of

the fair cash market value of the Rockdale properties. Bjork appraised the fair cash market value of the Rockdale properties as of November 1947 to be $1,508,000 and so advised the WAA and its appraisal division. The WAA and its appraisal division, after considering Bjork's appraisal of $1,508,000, approved and accepted it. Thereafter the WAA offered the Rockdale properties for sale under and subject to the surplus property act of 1944 (58 *Stat.* 765; *U. S. Code Cong. Service* 1944, p. 764) as amended and rules and regulations issued thereunder. px 144; 1 abs 178; 2 abs 198, 199.

On February 10, 1949 Lahman and Brubaker submitted a bid $875,000 for the Rockdale properties and under date of February 24, 1949 WAA executed a letter of intent which recited that WAA approved the sale of the Rockdale properties to Lahman and Brubaker for $875,000, payable $175,000 on delivery of possession and the balance payable as follows: $10,000 per quarter for 2 years, $18,000 per quarter for the next 7¾ years, and remaining balance at the end of 10 years on April 2, 1959, with interest at 4% per year also payable quarterly with privilege of prepayments. dx 26; 2 abs 200.

The letter of intent provided, among other things, that the purchasers would be allowed to take title in the name of a corporation to be organized but should remain liable for and guarantee payment of the purchase price. Other provisions of the February 24, 1949 letter of intent are set forth at 2 abs 200-02.

Considering the facts that during 1944 and 1945 the U. S. expended more than $2,600,000 for the Rockdale properties, that in November 1947 the WAA through its then valuation engineer Bjork—who later testified for Lahman—objectively appraised the properties at $1,508,000, that defendants' witness Hornoff testified that the May 29, 1950 reconstruction cost of the buildings on the Rockdale properties was in the neighborhood of $3,500,000 —4 abs 476 and that Bjork testified that the May 29, 1950

reconstruction costs of the buildings was $3,819,757—4 abs 533; px 144 pp 20, 21; px 157, it is obvious that the sale of the properties in February 1949 to Lahman and Brubaker for $875,000 payable over ten years with interest at 4% per year constituted a real bargain as was not uncommon in respect of liquidation of war surplus properties—and no one knew this better than Gould.

Both Bjork and Hornoff testified that the February 24, 1949 sale of the Rockdale properties by WAA for $875,000 was not evidence of the true value of the Rockdale properties. 4 abs 480, 558, 586, 587; 3 abs 100, 101.

—Interlake organized—acquires agreement to purchase Rockdale properties

On April 29, 1949 Interlake was incorporated under laws of Illinois and Lahman became president and one of its three directors. px 31; 2 abs 211.

In May 1949 Brubaker became seriously ill and at request of Brubaker's wife Lahman took over Brubaker's interests and obligations in respect of the Rockdale properties project. px 40; 1 abs 148, 149; 2 abs 212.

In May 1949 at Gould's request Lahman assigned to the loan company the agreement to purchase the Rockdale properties, including the interest Lahman acquired from Brubaker, as additional security for collateral notes executed by Lahman and Interlake. px 36; 1 abs 140; 2 abs 98, 213, 214; 4 abs 204, 206.

In June 1949 Lahman assigned to Interlake all his interest in the agreement to purchase the Rockdale properties in exchange for 10,000 common and 650 preferred shares in Interlake. dx 6; 4 abs 141, 596, 597.

Commencing in August 1949 Lahman obtained for Interlake several leases covering substantial floor areas in the Rockdale properties, all of which, with unimportant exceptions, Interlake assigned to the loan company as additional security for collateral notes executed by Lahman and Interlake. 1 abs 159, 290-92; 2 abs 223-25, 229, 233, 234, 243, 247, 251.

The costs and expenses of putting the Rockdale properties in operating condition proved to be much more than Lahman anticipated and Lahman was forced to borrow money to finance the project. Gould and his loan company knew of Lahman's desperate situation and took full advantage thereof by exacting from Lahman or Interlake more usurious, unconscionable and shocking commissions for money loaned. 2 abs 226-28.

Lahman also transferred 500 common and 250 preferred shares in Interlake to the Emmerts, 1000 common shares to Brubaker, and 25 preferred shares to Ronin. Lahman retained 375 preferred and 8,500 common shares in Interlake which he pledged to the loan company as additional security for collateral notes executed by Lahman and Interlake. 4 abs 597.

—The May 29, 1950 arrangement

By the latter part of May 1950 the June 21, 1950 principal and interest payments on the purchase price of the Rockdale properties, amounting to $10,000 and $7,600 respectively, would be due in less than 30 days and Interlake had a weekly payroll amounting to about $1,000 due within a few days. Interlake and Lahman were temporarily out of cash. Gould and his loan company were also short of available cash. On or shortly prior to May 29, 1950 Lahman went to Gould and requested that the loan company loan Interlake some funds. Gould refused. Lahman suggested that Gould or his loan company become a partner with Lahman or Interlake in the Rockdale properties project on a 50-50 basis. Gould refused to entertain the partnership suggestion and indicated that the only way he would provide financial help would be if the management and control of the Rockdale properties project were turned over to him or the loan company. 2 abs 250-52.

On May 29, 1950 Lahman conferred with Gould in the loan company's office, was there for an hour or two, and an arrangement or plan of procedure was worked out

which is hereinafter more fully discussed. Before detailing that arrangement it will be helpful to set forth the following pertinent facts and circumstances which existed as of May 29, 1950:

1. The issued and outstanding shares in Interlake consisted of 650 preferred shares having a par value of $100 each and 10,000 common shares having a par value of $1 each of which Lahman owned 375 preferred and 8,500 common—4 abs 596;

2. The principal asset of Interlake was the Rockdale properties which according to Bjork's appraisal were worth $1,541,920 and Interlake's net worth was about $500,000—px 63; 1 abs 157; 2 abs 253;

3. There were outstanding 139 collateral notes aggregating $168,140 in face amount signed by Interlake and co-signed or endorsed by Lahman—2 abs 255, 256;

4. The loan company held as collateral security for the $168,140 face amount of notes Lahman's 90 shares in Frantz, the agreement to purchase the Rockdale properties, substantially all leases covering areas in the Rockdale properties and all of Lahman's shares in Interlake—2 abs 213, 214, 254; px 68; dx 89; 4 abs 269, 597;

5. At least 91 of the above-mentioned 139 collateral notes aggregating $80,300 in face amount, all of which were series collateral notes, had been endorsed by the loan company "without recourse" and sold at par and were in the hands of the public—2 abs 257-59;

6. Forty-eight of the above-mentioned 139 collateral notes aggregating $87,840 in face amount were presumably held by the loan company—2 abs 259, 260;

7. In respect of th 91 collateral notes aggregating $80,300 in face amoun that were held by the public the loan company held the collateral security, including Lahman's shares in Interlake, as trustee or fiduciary for the benefit of Lahman and the holders of the collateral notes and was not in a position to acquire for itself absolute title to Lahman's shares in Interlake. As trustee or fiduciary for the holders of the outstanding collateral notes, it was the duty of the loan company to maintain a position where, if necessary, it could foreclose and sell the collateral security without conducting those foreclosure proceedings against itself—2 abs 261; 3 abs 167-70;

8. The 139 above-mentioned collateral notes then outstanding in face amount of $168,140 contained commissions charged by the loan company aggregating not less than $62,260 which commissions amounted to over 37% of the face amount of the notes—px 69; 1 abs 161-65;

9. Lahman and Interlake had the right to have the face amount of the outstanding collateral notes and accrued interest thereon scaled down or reduced in substantial amounts by reason of the unconscionable and shocking charges which Gould and his loan company exacted for the use of money—3 abs 184-94, 319-26;

10. By May 29, 1950 Interlake had built up a very substantial interest and equity in the Rockdale properties by reason of having paid the U. S. $115,000 principal and $23,500 interest on the purchase price thereof and having expended at least $70,000 in rehabilitating the properties. px 109, 220, 221; dfts' answer par 15(k); 1 abs 79, 173, 174, 211-14. Interlake had also sustained a $64,250.08 operating loss. 2 abs 262, 264. Lahman had invested not less than $47,000 in Interlake shares and had used not less than $64,350.36 of his personal funds for the benefit of Interlake. 2 abs 253; px 91; 2 abs 262. On the other hand, as of May 29, 1950 Gould and his loan company had only $19,580 invested in the project—$105,880 advanced on the $168,140 of notes less $86,300 realized from the sale of $86,300 of these notes to the public at par "without recourse". 1 abs 271; 2 abs 257-59, 261, 287; 3 abs 231.

11. Interlake owed not less than $53,023.73 to general unsecured creditors which Lahman subsequently paid—px 91; 1 abs 169;

12. Neither Lahman nor Gould knew the amounts Interlake owed to general unsecured creditors, but both of them assumed such amounts did not exceed $20,000—4 abs 67, 278, 279, 381;

13. Lahman had obtained on behalf of Interlake 17 leases, 15 of which were in existence on May 29, 1950 covering areas aggregating 425,589 square feet in the Rockdale properties and producing rents of $15,060.89 per month and $180,730.68 per year—dx 32-48, 76; 1 abs 289-94;

14. A commitment had been obtained from International Harvester Company that its lease should run for 5 years at a rent increased from $7,433.33 per month to $9,175 per month—2 abs 262;

15. Under the 15 leases in existence May 29, 1950 rents aggregating $586,652.23 would accrue after May 29, 1950 which exceeded by $418,512.23 the collateral notes then outstanding in the face amount of $168,140;

16. Negotiations were under way to lease to Caterpillar Tractor Co. substantial areas in the Rockdale properties and later Caterpillar leased from Interlake areas which produced rents aggregating $311,885.50 per year—px 204-06, 231; 4 abs 72, 73;

17. Lahman had devoted many, many hours to the task of converting the Rockdale properties from their stand-by condition which they had been in for 4 or 5 years, to a going project, which included hiring operating and office personnel, financing the project, obtaining tenants, checking and repairing the many thousands of sprinklers in the buildings, repairing leaks in water mains, repairing and rehabilitating railroad sidings, repairing roofs, repairing all wiring and fixtures, cleaning and repairing drain pipes, repairing ceiling beams and removing bins and shelving, in which rehabilitation program Lahman or Interlake spent at least $70,000—px 109, 220, 221; 4 abs 32; 1 abs 79;

18. Lahman had brought interlake through the serious business recession and steel and coal strikes of 1949 and the winter of 1949-1950 which was unusually long and cold and during which heating and other operating expenses were high and more than contemplated and by May 29, 1950 Interlake was entering upon the spring and summer seasons during which the heating and other operating expenses would be much less—px 109; 4 abs 154; 1 abs 173, 174;

19. Lahman did not claim or receive compensation for the very substantial services which he rendered in connection with the Rockdale properties project and did not claim or receive reimbursement for many of the expenses which he incurred and paid in connection with that project;

20. Although Interlake, as was to be expected, sustained operating losses during its first 11 months of operations, neither Gould nor Lahman knew the amount of such losses—4 abs 144, 285, 286;

21. The loan company was short of cash. Indeed the loan company was so hard up it could not give Lahman in cash the $11,000 contemplated by the May 29, 1950 ar-

rangement and had to pay it in installments or piecemeal. It is thus apparent that Gould and his loan company did not intend to use much, if any, of the loan company's funds to finance Interlake and must have been confident that Interlake would pay its own way with funds derived from the operations of the Rockdale properties or from the sale of Interlake's securities—4 abs 271, 277;

22. Prior to May 29, 1950 Gould did not have any experience in the warehousing business other than that which he acquired through Lahman in connection with the Rockdale properties—3 abs 196, 197;

23. A trust and fiduciary relationship existed between Lahman on the one hand, and Gould and his loan company on the other, by reason of the pledgor-pledgee and equitable mortgagor-mortgagee relationships—Gould and his loan company being the trustees and fiduciaries—3 abs 122-27;

24. A trust and fiduciary relationship existed between Lahman on the one hand, and Gould and his loan company on the other, by reason of the very friendly, close and confidential relationship that in fact existed between the parties, Gould and his loan company being the fiduciaries and confidants—3 abs 127-32;

25. A trust and fiduciary relationship existed between Lahman on the one hand, and Gould and his loan company on the other, as to Lahman's shares in Interlake and as to Lahman's equities or rights of redemption in respect of those shares—Gould and his loan company being the trustees and fiduciaries—3 abs 136-45;

26. Lahman was in extremely necessitous circumstances and under equitable duress—3 abs 163-65;

27. Lahman was nervous, apprehensive and distraught —2 abs 370, 371; and

28. Lahman placed in Gould a high degree of trust and confidence and Gould was the dominant and Lahman was the servient party—3 abs 127-32.

At the brief May 29, 1950 meeting between Lahman and Gould in the loan company's office the first informal 1-page letter dated May 29, 1950, copy of which is at page 18 of appendix, was prepared and signed by Interlake, Lahman, the loan company and Gould, which letter covered only a portion of the entire arrangement.

On June 1 or 2, 1950 Lahman had another brief meeting with Gould in the loan company's office at which time the second informal 1-page letter under the letterhead of the loan company, dated back to May 29, 1950, copy of which is at page 19 of appendix, was signed by the loan company, Lahman and Interlake, which letter also covered only a portion of the entire arrangement.

From the two informal 1-page letters dated May 29, 1950 and the conduct of the parties it is apparent that the May 29, 1950 arrangement included at least the following features:

1. The loan company was to have 100% voting control of Interlake and to that end the loan company was to have the voting rights on Lahman's 375 preferred and 8,500 common shares in Interlake which it then held as pledgee as collateral security for the collateral notes then outstanding in the face amount of $168,140 and Lahman was to acquire and pay for the other 275 preferred and 1,500 common shares in Interlake then held by the Emmerts, Ronin and Civilla J. Brubaker and turn them over to the loan company who was to have the voting rights on such shares;

2. The loan company was to take possession of and operate the assets and properties of Interlake;

3. Lahman agreed to pay all outstanding debts and obligations of Interlake due as of May 29, 1950 other than the $760,000 balance of the purchase price of the Rockdale properties due the U. S. for which he was already personally liable under his guarantee of April 10, 1950, the collateral notes then outstanding in the face amount of $168,140, the indebtedness of Interlake to Lahman and the additional collateral notes which were to be issued, dated May 15, 1950 aggregating $50,000 in face amount, hereinafter referred to;

4. The loan company was to have the right to continue to sell or deal in the 139 collateral notes then outstanding in face amount of $168,140 which right the loan company exercised at will;

5. The loan company was not to be required to return to Lahman or Interlake the 139 collateral notes then outstanding in the face amount of $168,140 at least until some future date;

6. In order to raise funds to finance Interlake, Interlake was to execute additional collateral notes dated May 15, 1950 aggregating $50,000 in face amount which notes were to bear Lahman's signature as president of Interlake and were to recite that they were secured by a 5-year lease from International Harvester Company calling for payments of rent of $9,175 per month payable to the loan company and neither Gould nor his loan company obligated themselves to put any of their own funds in the project—2 abs 274, 275;

7. Lahman, his heirs, executors, administrators and assigns were to remain personally liable on his continuing and irrevocable guaranty of April 10, 1950 to the U. S. for the payment of the $760,000 balance of the purchase price of the Rockdale properties and interest thereon at 4% per annum;

8. The loan company was not to become personally liable to pay the $760,000 balance of the purchase price of the Rockdale properties or interest thereon or any other of Interlake's liabilities;

9. The loan company was not to refund any of the unearned or other commissions aggregating not less than $62,260 contained in the 139 collateral notes then outstanding in the face amount of $168,140;

10. The loan company was not to refund any of the unearned commissions paid to brokers in respect of the 15 existing leases covering areas in the Rockdale properties;

11. The loan company was not to refund any of the unearned premiums in the amount of $2,051.81 paid on insurance;

12. No inventory of supplies, materials or other assets was to be taken; and

13. The loan company was to loan or pay Lahman $11,000, which included a check dated May 26, 1950 in the amount of $2,400 which Lahman received and cashed May 27, 1950, and the balance of $8,600 was to be payable $2,600 on June 5, 1950 and $6,000 on July 1, 1950.

At 2 abs 269-72 the two informal 1-page letters dated May 29, 1950 are analyzed and it is shown wherein they are incomplete, inaccurate, ambiguous and meaningless in certain respects including:

1. Neither of the letters dated May 29, 1950 referred to any equities or rights of redemption or provided they were being cut off, foreclosed or otherwise adversely affected—2 abs 269-72;

2. Neither of the letters dated May 29, 1950 was signed or approved by the holders of the 91 collateral notes aggregating $80,300 in face amount which the loan company had endorsed "without recourse" and sold to the public at par—2 abs 269-72; and

3. Both letters dated May 29, 1950 were inaccurate, ambiguous or meaningless in several respects and represented to Lahman that the loan company held all the 139 collateral notes then outstanding aggregating $168,140 in face amount which was contrary to the fact as 91 of such notes aggregating $80,300 in face amount were held by the public and not by the loan company—2 abs 269-72.

The versions of the respective parties as to what was said and done when the two informal 1-page letters dated May 29, 1950 were signed are set forth quite in detail at 2 abs 272-83 from which the following, among other things, appear:

1. Both of the May 29, 1950 letters were hastily prepared and signed in the privacy of Gould's office;

2. Lahman was alone and without legal or other advice—3 abs 245-50;

3. If Lahman in fact desired or intended to sell the Rockdale properties project to the loan company for $950,000 he could have done so by causing Interlake to sell the properties to the loan company or its nominee, in which event Lahman would have realized cash in the net amount of approximately $6,028, whereas under defendants' theory of the May 29, 1950 arrangement Lahman paid or obligated himself to pay not less than a net of $77,020.73 of additional cash—a net detriment to Lahman of $83,048.73. Gould and his loan company caused or permitted Lahman to enter into the May 29, 1950 arrangement rather than other available courses which were much less burdensome and much more favorable to Lahman—3 abs 235-37;

4. Gould and the loan company concealed from Lahman that on May 29, 1950 the loan company did not own all of the $168,140 of collateral notes then outstanding but that the public held 48% thereof—3 abs 237-41;

5. Lahman and Gould worked out terms of the May 29, 1950 arrangement under mutual mistake of fact that Interlake owed general creditors not more than $20,000 whereas Interlake owed about $60,000—3 abs 241;

6. Gould and the loan company held out "delusive hopes" to Lahman in connection with May 29, 1950 arrangement—3 abs 241-44;

7. Gould and the loan company failed to advise Lahman that they would contend that the May 29, 1950 arrangement would constitute a waiver of Lahman's claims based on unconscionable and shocking charges for use of money —3 abs 245;

8. Gould's words, acts and conduct when the May 29, 1950 arrangement was made were oppressive and coercive —3 abs 245-50;

9. Lahman requested Gould to become a 50-50 partner with him in the Rockdale properties project—2 abs 278;

10. Gould and his loan company did not have the cash which Interlake needed May 29, 1950 for temporary financing—2 abs 280;

11. Without prior notice to Lahman Gould at the May 29, 1950 meeting sprung on Lahman the demand that Interlake issue an additional $50,000 in face amount of notes signed by Lahman as president and dated back to May 15, 1950, which Gould could use to raise cash which Interlake needed for temporary financing, and when Lahman suggested that if Gould would let him have only half of $50,000, that would solve Lahman's problems, Gould put on the pressure, threatened to withdraw all support and mentioned the possibility of bankruptcy for Lahman and assured Lahman he could trust Gould as he had in the past—2 abs 274-76;

12. Lahman testified as he did in the *Brubaker case* 34 Ill App 2d 421 (1962 1st) that he had an oral agreement with Gould that the May 29, 1950 arrangement was intended to be only additional collateral for the loan company. 2 abs 272-78. In the *Brubaker case* the Illinois appellate court at 432 and 433 found in favor of Lahman and against Gould on this issue; and

13. While defendants deny the existence of any oral agreement that the May 29, 1950 arrangement was to be only additional collateral for the loan company, defend-

ants admit that at the May 29, 1950 meeting Lahman asked Gould:

> "Please, if you take it [Interlake] over, can I rely on you to take care of me and turn this back at some future date, after you get your money back?"

and that Gould did not actually say yes or no but did say:

> "Harold, we have mutual confidence in each other. I'll use you right."

and that was the agreement between Gould and Lahman —dx 24, Abraham pp 122, 123.

Defendants also admit that Lahman felt in his heart that Gould would pay himself off and return the property to Lahman—Abraham 4 abs 126; 2 abs 280, 281; dfts' appellate court brief p 55.

Thus by defendants own admissions it does not "clearly and unequivocally" appear that Lahman understood and intended that the May 29, 1950 arrangement should cut off and bar Lahman's equities or rights of redemption in respect of his shares in Interlake and consequently that arrangement "will be regarded as a mere change in the form or character of the security." *Ennor* v *Thompson* 46 Ill 214, 222 (1867); 3 abs 159-61.

—Significant occurrences following May 29, 1950

During the year following May 29, 1950 at least $44,000 in face amount of the additional collateral notes dated May 15, 1950 aggregating $50,000 in face amount which Gould requested Lahman to sign as president of Interlake were endorsed "without recourse" and sold to the public at par and the proceeds used by Gould temporarily to finance Interlake. All of the collateral notes dated May 15, 1950 aggregating $50,000 in face amount were ultimately returned to Lahman. px 88; 4 abs 244, 247, 253, 301, 356, 369; 1 abs 168; 2 abs 286.

After May 29, 1950 the loan company continued to sell and deal in the collateral notes in the face amount of $168,140 that were outstanding May 29, 1950 and endorsed

not less than $6,000 in face amount of such notes "without recourse" and sold them to the public at par. px 100, 101, 211; 2 abs 179, 287, 288.

After May 29, 1950 the loan company kept Lahman's general superintendent, Martin, as general superintendent of the Rockdale properties and the loan company retained Martin in that capacity until August of 1956 or later. Martin was in charge of the Rockdale properties and had a free hand down there. 4 abs 93, 206, 273, 441; 2 abs 288, 289.

Under date of June 15, 1950, pursuant to commitment made prior to May 29, 1950, International Harvester Company leased an additional 59,876 square feet of floor area in the Rockdale properties for a term commencing July 1, 1950 and ending August 31, 1954 at an additional annual rent of $23,180. px 85; dx 36; 2 abs 289; 1 abs 289, 291.

As hereinbefore set forth, in the spring of 1950 before May 29, 1950 Interlake commenced negotiations to lease substantial areas in the Rockdale properties to Caterpillar Tractor Co. and Lahman so informed Gould—4 abs 72, 73; 2 abs 289. Shortly after May 29, 1950, under the management of general superintendent Martin whom Gould inherited from Lahman, Caterpillar leased from Interlake very substantial floor areas in the Rockdale properties by leases dated, for the terms, covering the square foot areas, at the rents aggregating $311,885.50 annually, as hereinafter set forth—px 204, 205, 206, 231; 1 abs 289, 293, 294; 2 abs 289:

date of lease	term	sq. ft. leased	rent sq. ft.	rent annual
Aug. 21, 1950	1 yr.	3,809	$ .50	$ 1,904.50
May 1, 1951	3 yrs.	141,305	.575	81,250.00
Aug. 9, 1951	1 yr.	6,455	.60	3,873.00
Nov. 1, 1951	2 yrs.+	79,283	.575	45,587.00
Dec. 7, 1951	5 yrs.	187,940	.90	169,146.00
Jan. 2, 1952	5 yrs.	11,250	.90	10,125.00

In addition, shortly after May 29, 1950 other responsible lessees leased substantial areas in the Rockdale prop-

erties, including the following who, on the dates indicated, leased the areas, for the terms and at the rents hereinafter set forth—px 207, 232; 1 abs 289, 293, 294; 2 abs 290;

lessee	date of lease	term	sq. ft. leased	rent sq. ft.	rent annual
Coles Cranes, Inc.	5- 9-51	3 yrs.	10,803	$ .622	$6,720.00
Harry A. Lowther Co.	12-27-51	1 yr.	4,000	.75	3,000.00

After May 29, 1950 International Harvester Company prepaid substantial amounts of rents, by way of advances. As of May 9, 1951 $29,400 in rents were paid in advance—px 91; 4 abs 153; 1 abs 169; 2 abs 290.

Immediately after May 29, 1950, under the management of general superintendent Martin whom Gould inherited from Lahman, the Rockdale properties produced very high rents and net earnings. Within less than a year after May 29, 1950 the Rockdale properties produced net profits of more than $112,493 per year. In 1951 and 1952 the Rockdale properties produced gross rents of $358,590.68 and $456,858.43—4 abs 593. The net profits before depreciation would be not less than $222,722.81 in 1951 and $320,990.43 in 1952, and the net profits after depreciation would be not less than $178,923.68 in 1951 and $277,191.43 in 1952—2 abs 291. During 1953 Interlake's gross income was $519,361.86 and during 1954 was $538,221.43. px 91; 4 abs 307; 1 abs 169; 2 abs 290, 291.

After May 29, 1950 under the management of general superintendent Martin whom Gould inherited from Lahman, Interlake had ample funds from the sale of Interlake notes secured by leases on the Rockdale properties, rents paid in advance and the very high profits from the Rockdal properties, to make all principal and interest payments on the $760,000 balance of the purchase price of the Rockdale properties as they matured. As early as April 6, 1951—within less than a year after May 29, 1950—Interlake began to make substantial prepayments on the balance of the purchase price and by the latter part of 1952 had prepaid $119,531.25 thereof. px 203; abs 291-93.

After May 29, 1950, because of the large amounts realized by Interlake from the sale of its collateral notes, from rents paid in advance, and the very substantial sums in rents that were realized from Interlake's lessees—$358,590.68 in 1951 and $456,858.43 in 1952—it never became necessary for either Gould or his loan company to use any of his or its personal funds for the purpose of financing the Rockdale properties project, but Interlake was able to and did finance itself. Defendants did not prove or attempt to prove otherwise—2 abs 121-23, 293. It was Interlake, not Gould or his loan company, that paid the $760,000 balance of purchase price of the Rockdale properties and the $168,140 in face amount of outstanding collateral notes and interest thereon and it was Lahman, not Gould or his loan company, who paid the other liabilities of Interlake aggregating not less than $53,020.73.

As above indicated, on May 29, 1950 Gould and his loan company did not have the cash which Interlake needed for temporary financing—2 abs 280, and Gould resorted to the device of demanding that Interlake issue an additional $50,000 in face amount of notes signed by Lahman as president and dated back to May 15, 1950. Indeed, as Gould himself testified, Gould and his loan company did not have enough cash to pay Lahman the $11,000 mentioned in the first informal 1-page letter dated May 29, 1950—appendix 18—and had to pay it in installments or piecemeal—2 abs 284; 4 abs 271, 277.

—Lahman's financial condition following May 29, 1950

As of May 29, 1950 Lahman had become heavily indebted and obligated. Pursuant to his obligation under the May 29, 1950 arrangement Lahman undertook to acquire the Interlake shares owned by minority shareholders and turn them over to the loan company. Lahman was not in a position to pay cash for all the minority shares and gave judgment notes for most of them which ultimately resulted in judgments against Lahman, more than $60,000

of which judgments remain unpaid. px 208, 209, 210; 1 abs 209; 2 abs 295-97; 4 abs 125, 453, 454, 597, 598.

As to the 1,000 common Interlake shares held by the Brubakers shortly after May 29, 1950 Lahman contacted the Brubakers and tried to purchase their shares so he could turn them over to the loan company, and met with considerable resistance. Finally on May 9, 1951, after receiving threats and pressure from Gould, Lahman succeeded in getting the Brubakers' shares at a cost of $5,000 and delivered the certificate representing such shares to the loan company. 4 abs 125, 453, 454; 2 abs 296, 297. This is the transaction involved in *Brubaker* v *Gould* 34 Ill App 2d 421 (1962 1st).

Under the May 29, 1950 arrangement Lahman also obligated himself to pay not less than $53,020.73 on account of unsecured obligations of Interlake. Lahman received $10,500 cash pursuant to the May 29, 1950 arrangement but used most, if not all, of this cash to pay Interlake's creditors. px 91; 4 abs 80; 2 abs 297.

By reason of financing the Rockdale properties project during the conversion and rehabilitation period, and the unconscionable and shocking commissions charged by the loan company, $16,778.50 of which Lahman had been required to pay the loan company in cash—1 abs 288, by May 29, 1950 Lahman had become indebted in substantial amounts not only to the loan company but also to others, including $22,000 to the National Bank of Sterling and $21,000 to The First National Bank of Chicago, which banks held over 100 of Lahman's shares in Frantz as collateral security, and which loans would have to be refinanced in the near future. 4 abs 82, 132; 1 abs 288; 2 abs 294, 295.

Gould saw in Lahman's financial picture following May 29, 1950 an opportunity to continue to loan money to Lahman and exact from him more unconscionable and shocking commissions and interest. 2 abs 298.

—Loan transactions after May 29, 1950

In late June or early July 1950 Gould informed Lahman that he would not loan any more money unless Lahman had a corporation. Gould's reasons for this attitude were that his loan company could sell the collateral notes a little easier if they were signed by a corporation rather than by Lahman individually and that the corporation could not assert the defense of usury. 4 abs 74, 81; 2 abs 299.

Gould caused the loan company's attorney, Israel Dordek, to prepare the incorporation papers for the proposed corporation Lahman Inc. and later showed them to Lahman who, at Gould's request, executed them. 4 abs 81, 189; 2 abs 299, 300.

The facts relating to the purported corporation, Lahman Inc., and its involuntary dissolution by the state for failure to pay its first annual franchise tax which amounted to only $10 and was due in July 1951 are set forth at 2 abs 299-303, 335-37; 3 abs 181-84, 347.

The organization of Lahman Inc. was never completed; it never became authorized to transact business; Lahman's 117.2 shares in Frantz which were to be used as security for proposed loans were never transferred to or owned by Lahman Inc.; and neither Gould nor the loan company ever regarded Lahman Inc. as possessing any substance. The principal significance of the sham Lahman Inc. is its proof of Gould's domination and influence over Lahman and Lahman's trust and confidence in Gould. 3 abs 347.

During the period following May 29, 1950 and until June 26, 1951—the date of the June 26, 1951 arrangement —Lahman continued to be in extremely necessitous circumstances and needed funds for various purposes, including the paying of Interlake's creditors, paying or refinancing indebtedness to others which he had incurred primarily in connection with the Rockdale properties proj-

ect, paying or refinancing loans which the loan company made to Lahman, paying unconscionable and shocking commissions exacted by the loan company, and paying claims of Snyder and Holley, real estate brokers, aggregating over $15,000. 2 abs 303-18.

During the period from July 20, 1950 to June 26, 1951 the loan company engaged in some 10 loan transactions with Lahman which were evidenced by collateral notes signed in the name of the sham Lahman Inc. and endorsed by Lahman to secure which Lahman pledged and delivered to the loan company a total of 117.2 shares in Frantz which he owned. In these collateral note transactions the loan company loaned Lahman a total of $78,000 cash and charged commissions aggregating $26,100. The average amount of cash which the loan company had outstanding was $50,003.21 and the $26,100 in commissions amounted to $27,853.15 or 55% per year which, with the loan company's interest charge of 6% per year, amounted to 61.7% per year on the amount loaned. px 169; 1 abs 272-74, 288; 2 abs 303-18.

During the period from June 14, 1950 to June 26, 1951 the loan company engaged in some 70 loan transactions with Lahman which were evidenced by exchange checks. In these exchange check transactions the loan company charged commissions aggregating $15,275 most if not all of which Lahman was required to pay to the loan company in cash. The commissions thus charged by Gould and his loan company were unconscionable and shocking. Such commissions in at least 35 instances amounted to more than 500% per year on the amount loaned; in at least 16 instances to more than 1,000% per year on the amount loaned; in at least 6 instances to more than 2,737% per year on the amount loaned; in at least 5 instances to more than 3,241% per year on the amount loaned; and in at least 4 instances to more than 3,650% per year on the amount loaned. px 92; 1 abs 274-84, 288; 2 abs 188, 303-18.

—The June 26, 1951 arrangement

On June 26, 1951 Lahman went to see Gould at the loan company's office to arrange for a loan to pay Interlake's creditors and another arrangement or plan of procedure was worked out, which is hereinafter more fully discussed. Before detailing that arrangement it will be helpful to set forth the following pertinent facts and circumstances which existed as of June 26, 1951:

1. There were outstanding 94 collateral notes aggregating $104,100 in face amount signed in the name of Lahman, Inc. and endorsed by Lahman—px 69; 1 abs 163, 256-62, 272, 273; 2 abs 318;

2. Lahman owned and had pledged 117.2 shares in Frantz to the loan company which the loan company held as collateral security for the 94 collateral notes then outstanding in the face amount of $104,100—2 abs 318;

3. At least 49 of the above-mentioned 94 collateral notes aggregating $44,500 in face amount, all of which were series collateral notes, had been endorsed by the loan company "without recourse" and sold at par and were in the hands of the public—2 abs 319;

4. Forty-five of the above-mentioned 94 collateral notes aggregating $59,600 in face amount were presumably held by the loan company—2 abs 320;

5. In respect of the 49 collateral notes aggregating $44,500 in face amount that were held by the public the loan company held the collateral security, including Lahman's 117.2 shares in Frantz, as trustee or fiduciary for the benefit of Lahman and the holders of the collateral notes and was not in a position to acquire for itself absolute title to Lahman's 117.2 shares in Frantz. As trustee or fiduciary for the holders of outstanding collateral notes, it was the duty of the loan company to maintain a position where, if necessary, it could foreclose and sell the collateral security without conducting those foreclosure proceedings against itself—2 abs 261; 3 abs 167-70;

6. The 94 above-mentioned collateral notes then outstanding in face amount of $104,100 contained commissions charged by the loan company aggregating not less than $26,100 which commissions amounted to about 25% of the face amount of the notes—px 69;1 abs 163, 272, 273;

7. Lahman had the right to have the face amount of the outstanding collateral notes and accrued interest thereon scaled down or reduced in substantial amounts by reason of the unconscionable and shocking charges which Gould and his loan company exacted for the use of money —3 abs 184-94, 319-26;

8. In addition to being a shareholder in Frantz, Lahman was a director of Frantz and its secretary and treasurer—4 abs 605;

9. During the 13 months following the May 29, 1950 arrangement Lahman had struggled to acquire and turn over to the loan company 275 preferred and 1,500 common shares in Interlake held by Ronin, the Emmerts and Brubaker; he had struggled to pay Interlake's creditors; the loan company had exacted from him unconscionable and shocking commissions aggregating $41,475, $26,100 of which were in connection with collateral note transactions and $15,275 of which were in connection with exchange check transactions, and had required Lahman to pay the $15,275 in cash—2 abs 322;

10. A trust and fiduciary relationship existed between Lahman on the one hand, and Gould and his loan company on the other, by reason of the pledgor-pledgee relationship—Gould and his company being the trustees and fiduciaries—3 abs 122-27;

11. A trust and fiduciary relationship existed between Lahman on the one hand, and Gould and his loan company on the other, by reason of the very friendly, close and confidential relationship that in fact existed between the parties—Gould and his loan company being the fiduciaries and confidants—3 abs 127-32;

12. A trust and fiduciary relationship existed between Lahman on the one hand, and Gould and his loan company on the other, as to Lahman's 117.2 shares in Frantz and as to Lahman's equity or right of redemption in respect of those shares—Gould and his loan company being the trustees and fiduciaries—3 abs 136-45;

13. Lahman was in extremely necessitous circumstances and under equitable duress—3 abs 163-65;

14. Lahman was nervous, apprehensive and distraught —2 abs 370, 371; and

15. Lahman placed in Gould a high degree of trust and confidence and Gould was the dominant and Lahman was the servient party—3 abs 127-32.

At the June 26, 1951 meeting the first informal 1-page letter under the letterhead of the loan company dated June 26, 1951, copy of which is at page 20 of appendix, was prepared and signed by the loan company and Lahman, which letter covered only a portion of the entire arrangement.

On June 27 or 28, 1951 Lahman had another meeting with Gould in the loan company's office at which the second informal 1-page letter under the letterhead of the loan company dated back to June 26, 1951, copy of which is at page 21 of appendix, was signed by the loan company and Lahman, which letter likewise covered only a portion of the entire arrangement.

From the two informal 1-page letters dated June 26, 1951 and the conduct of the parties it is apparent that the June 26, 1951 arrangement included at least the following features:

1. The loan company was to loan or pay Lahman an additional $15,000 payable $6,500 on June 26, 1951 and $8,500 on July 2, 1951;

2. The loan company was not to be entitled to a transfer of Lahman's 117.2 shares in Frantz on the books of the corporation at least until some future date;

3. The loan company was not to be entitled to vote Lahman's 117.2 shares in Frantz at least until some future date;

4. The loan company was not to be entitled to dividends on Lahman's 117.2 shares in Frantz at least until some future date;

5. The loan company was to have the right to continue to sell or deal in the 94 collateral notes then outstanding in the face amount of $104,100 which right the loan company exercised at will as hereinafter more fully set forth;

6. The loan company was not to be required to return to Lahman the 94 collateral notes then outstanding in the face amount of $104,100 at least until some future date;

7. The loan company was not to refund all of the unearned or other commissions aggregating not less than $26,100 contained in the 94 collateral notes then outstanding in the face amount of $104,100; and

8. Lahman was to have the first right of refusal in respect of the 117.2 shares in Frantz.

At 2 abs 325-27 the two informal 1-page letters dated June 26, 1951 are analyzed and it is shown wherein they are incomplete, inaccurate, ambiguous or meaningless in certain respects. The following are noted here:

1. Both letters referred to collateral notes in the face amount of $104,100 "which we [the loan company] hold" but the loan company had endorsed at least 49 of the collateral notes then outstanding aggregating $44,500 in face amount "without recourse" and sold them to the public at par, which notes were in the hands of the public and not held by the loan company;

2. By both letters the loan company represented to Lahman that the loan company held all 94 collateral notes then outstanding aggregating $104,100 in face amount which was contrary to the fact as the loan company had endorsed at least 49 of the collateral notes then outstanding aggregating $44,500 in face amount "without recourse" and sold them to the public at par, which notes were in the hands of the public and not held by the loan company;

3. Neither letter referred to Lahman's equity or right of redemption or provided that it was being cut off, foreclosed or otherwise adversely affected;

4. Neither letter was signed or approved by the holders of the 49 collateral notes aggregating $44,500 in face amount which the loan company had endorsed "without recourse" and sold to the public at par; and

5. Neither letter referred to or was signed by Lahman, Inc. although all the 94 collateral notes aggregating $104,100 in face amount were signed in the name of Lahman, Inc.

The versions of the respective parties as to what was said and done when the two informal 1-page letters dated June 26, 1951 were signed are set forth quite in detail at 2 abs 327-32 from which the following, among other things, appear:

1. Both of the June 26, 1951 letters were hastily prepared and signed in the privacy of Gould's office;

2. Lahman was alone and without legal or other advice —3 abs 275-77;

3. Gould and the loan company concealed from Lahman that on June 26, 1951 the loan company did not own all the $104,100 of collateral notes then outstanding but that the public held 43% thereof—3 abs 273-75;

4. Gould and the loan company failed to advise Lahman that they would contend that the June 26, 1951 arrangement would constitute a waiver of Lahman's claims based on unconscionable and shocking charges for use of money—3 abs 275;

5. Gould's words, acts and conduct when the June 26, 1951 arrangement was made were oppressive and coercive —3 abs 275-77;

6. Although the June 26, 1951 arrangement was important to defendants on their theory thereof, Gould while being examined under section 60 of civil practice act could recall very little about the conversations that necessarily took place between Lahman and Gould leading up to and during the transaction—2 abs 330-32;

7. Although Mrs. Kolkey was working in the loan company's office on June 26, 1951 she was not aware of any "sale" by Lahman to the loan company of Lahman's 117.2 shares in Frantz—2 abs 331;

8. Although Mrs. Gould worked in the loan company office until June 22, 1951—only 4 days before the June 26, 1951 arrangement—she left for Europe on June 22, 1951 and did not return until several weeks later, she was not aware that any "sale" by Lahman to the loan company of Lahman's 117.2 shares in Frantz was pending and she was greatly surprised to learn of the transaction when she was in London and received a letter from Gould—2 abs 331-32;

9. Lahman testified that despite the two letters dated June 26, 1951 he had an oral agreement with Gould that the loan company was to hold Lahman's 117.2 shares in Frantz as collateral for the indebtedness evidenced by the $104,100 face amount of collateral notes then outstanding, which indebtedness Lahman considers still exists, and as collateral for the $15,000 advance which the loan company then agreed to make and for future advances—2 abs 324; 4 abs 152, 153, 606, 607; and

10. Lahman informed Gould that a sale and transfer

on the books of Frantz to the loan company of Lahman's 117.2 shares in Frantz would jeopardize Lahman's position with Frantz—2 abs 328.

The $15,000 contemplated by the June 26, 1951 arrangement was advanced or paid to Lahman, $6,500 on June 26, 1951 and $8,500 on June 30, 1951.

After June 26, 1951 the loan company continued to sell and deal in the collateral notes in the face amount of $104,100 that were outstanding June 26, 1951. The loan company endorsed "without recourse" 7 of such collateral notes aggregating $6,500 in face amount and after June 26, 1951 sold them to the public at par. 2 abs 180, 332, 333.

—July 1951 Lahman executes continuance of his prior guaranty of $650,000 balance of purchase price for Rockdale properties

In June 1951 the U.S. conveyed the Rockdale properties to Interlake and took back from Interlake a $650,000 purchase money mortgage to secure the balance of the purchase price and in connection with the transaction Lahman at the request of the GSA executed a continuance of his prior guaranty of the $650,000 balance of the purchase price of the Rockdale properties and interest thereon. px 55; 4 abs 78, 159, 397; 2 abs 333-35.

—Gould threatens Lahman

In late April or early May 1955 Gould learned that Lahman was considering commencing these proceedings and Gould, through one Donner, threatened to send Lahman to the penitentiary for issuing the NSF checks and for perjury. 4 abs 425-28.

May 16, 1955 Lahman commenced these proceedings and shortly thereafter Gould again threatened Lahman, sent word to him that he had better drop this law suit, that Lahman did not have the money to fight Gould, that Gould was going to win this law suit and have Lahman put in jail for perjury. 4 abs 160, 428; 3 abs 369-74.

(e)—The federal questions are substantial —Summary of applicable legal and equitable principles

Defendants' contention that by reason of the May 29, 1950 and June 26, 1951 arangements, the loan company acquired Lahman's shares in Interlake and his shares in Frantz free and clear of any equity or right of redemption places the loan company squarely in the position of a pledgee or mortgagee who claims to have purchased the pledgor's or mortgagor's equity or right of redemption as an alternative to foreclosure, and apart from any other trust, fiduciary or confidential relationships that existed between the parties, defendants have the burden of proving substantially the same degree of good faith and fair play as is required of a trustee or fiduciary who purchases property from his *cestui que trust.*

1 *Bigelow on Fraud* (1890) at page 348:

> "Indeed it is directly held in this country that when, upon such a sale, the mortgagor sues to regain possession and for account of rents and profits, the burden is upon the mortgagee to prove, by evidence beyond the deed, that the conveyance was fair and that he paid for [349] it what it was worth, in order to rebut a presumption of fraud."

In the leading case of *Carter Oil Co.* v *Durbin* 376 Ill 398, 34 NE 2d 407 (1941) certiorari denied 314 U S 644, 86 L ed 517 (1941) the court said at page 409:

> "We also noticed that Koeberlein's theory of the case is disclosed by his answer that he had taken the quitclaim deed from the Durbins merely for the purpose of extinguishing their right of redemption. This answer clearly places him, on his own theory of the case, in the position of a mortgagee dealing with his mortgagor for a conveyance of the mortgagor's equity. This relationship is one about which the law is very strict, not only in Illinois, but everywhere. While it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a trans-

fer or agreement to transfer is one that is zealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness. It is the spirit and intent of [410] our law and it is our public policy, as declared by the statutes of this State, that mortgagors shall have a reasonable time within which to redeem, and such laws have always been liberally construed. Reflection makes it apparent that our public policy as to redemption could not be maintained under any other rule.

"All of the text books and cases agree on this subject and numerous citations are unnecessary. The rule has been succinctly stated by the Supreme Court of the United States as long ago as 1870 in the case of *Alexander* v *Rodriguez,* 12 Wall 323, where the court said: 'The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee, was, in all things, fair and frank and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The forms of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals and the protection due to those whose property is thus involved, require that such should be

the law. *Morris* v *Nixon,* 1 How 118; *Russell* v *Southard,* 12 id 139; *Wakeman* v *Hazleton,* [411] 3 Barb Ch 148; 4 Kent's Com 143; *Holmes* v *Grant* 8 Paige 245; 3 Lead Cas Eq 625.' "

While the *Carter Oil Co. case* involved real estate it is well settled that the same rules of good faith and fair play apply where the security consists of personal property or securities. *Schnitter* v *Lau* 189 Fed 893 (1911 CCA 8); *Gibbons* v *Joseph Gibbons Consol. Min. & Mill Co.* 37 Colo 96, 86 P 94 (1906); *Clarke* v *Fast* 128 Cal 422, 61 Pac 72 (1900); *Jones v Franks* 33 Kan 497, 6 Pac 798 (1895); *Collins* v *Denny Clay Co.* 41 Wash 136, 82 P 1012 (1905); 2 *Jones, Chattel Mortgages and Conditional Sales* (Bowers Ed 1933) secs. 469, 681.

In addition to the rule of *Carter Oil Co.* and in addition to the trust, fiduciary and confidential relationships that existed between the parties as a matter of law, commencing in 1945 and continuing until shortly before the commencement of these proceedings on May 16, 1955, a trust, fiduciary and confidential relationship existed as a matter of fact between Lahman on the one hand, and Gould and his loan company on the other, by reason of the very friendly, close and confidential relationship that existed between the parties—Gould and the loan company being the fiduciaries and confidants. 2 abs 361-68; 3 abs 127-32.

Because of the rule of *Carter Oil Co.,* as well as the trust, fiduciary and confidential relationships that existed both as a matter of law and as a matter of fact, transactions between the parties—particularly any attempt by the loan company to acquire Lahman's shares in Interlake or his shares in Frantz in lieu of foreclosure—will be jealously scrutinized in equity and defendants have the burden of vindicating the transactions from any shadow of suspicion and of proving that they were perfectly fair and reasonable in every respect, and that Gould and his loan company exercised good faith and

did not betray the confidence reposed in them. To overcome the presumption of fraud, defendants have to show: (1) full disclosure of all relevant information to Lahman; (2) adequate consideration; and (3) competent and independent advice to Lahman before completing the transactions. 3 abs 133-35, 248-50; *Schueler* v *Blomstrand* 394 Ill 600, 611 (1946); *Bremer* v *Bremer* 411 Ill 454, 457 (1952); *Works* v *McNeil* 1 Ill 2d 47, 52, 54 (1953); *Rizzo* v *Rizzo* 3 Ill 2d 291, 305 (1954); *Burrows* v *Palmer* 10 Ill 2d 344, 353 (1956); *Majewski* v *Gallina* 17 Ill 2d 92, 102 (1959); *McFail v Braden* 19 Ill 2d 108, 118 (1960); *Moehling* v *O'Neil Construction Co.* 20 Ill 2d 255, 266, 267 (1960); *Hofert* v *Latorri* 22 Ill 2d 126, 132 (1961); *Schmitt* v *Wright* 317 Ill App 384 (1943 1st); *Bogert, Trusts and Trustees* sec 544 (2d ed 1959).

The charges exacted by Gould and his loan company in the collateral note and exchange check transactions, hereinbefore reviewed, were unconscionable and shocking and where, as here, the exactions amount to 50% or more per year equity will, irrespective of the applicability of the usury statutes, grant relief and will permit the money lender to recover only his actual advances with interest at the legal rate which in Illinois has been 5% per year for many years. *Ill Rev Stat* 1961 ch 74 pars 1, 2. Equity will apply all exactions in excess of 5% per year in reduction of principal. 3 abs 184-94, 319-26, 343-47; *Ball* v *Leonard* 24 Ill 146 (1860); *Woodworth* v *Huntoon* 40 Ill 131, 138 (1865); *Jenkins* v *Greenbaum* 95 Ill 11, 19, 20, 23, 24 (1880); *Higgins* v *Lansingh* 154 Ill 301, 361, 369, 373 (1895); *Miller* v *Cook,* L R 10 Eq 641, 646, 647 (1870); *Earl of Aylesford* v *Morris* L R 8 Chanc App 484, 490, 496 (1872-73); *Kevans* v *Joyce* [1896] 1 I R 442, 462, 463, 471; *Villa* v *Rodriguez* 79 U S (12 Wall) 323, 339, 20 L ed 406 (1870); *Peugh* v *Davis* 96 U S (6 Otto) 322, 339, 24 L ed 775 (1878); *In re Tastyeast, Inc.* 162 F 2d 879, 880, 882 (1942 CCA 3) certiorari denied 316 U S 696, 86 L ed 1776 (1942); *Stiefler* v *McCullough* 97 Ind App

123, 174 NE 823 (1931); *Bither* v *Packard* 115 Me 306, 311, 314, 98 Atl 933 (1916); *Phillips* v *Blaser* 13 Wash 2d 439, 448, 125 P 2d 291 (1942); *Sime* v *Norris* 8 Phila Rep 84, 85 (1874); *Brown* v *Hall* 14 R I 249, 250, 254 (1883).

To permit the loan company to use the collateral notes at one hundred cents on the dollar in payment of the alleged purchase prices of Lahman's shares in Interlake and his shares in Frantz would not only effect repayment to the loan company of all cash advanced, but also consummate the payment to the loan company of very substantial amounts of unconscionable and shocking exactions for the use of money, and a refusal by the court to recognize Lahman's right to recover the shares in Interlake and his shares in Frantz by way of redemption, restitution or constructive trust would have the effect of sanctioning the exaction by the loan company of those unconscionable and shocking exactions. This equity should not do. 3 abs 195, 196; *Earll* v *Picken* 113 F 2d 150, 155 (1940 CCA DC); *Lewis* v *Wells* 85 Fed 896, 899 (1898 DC Alaska); *Kevans* v *Joyce* [1896] 1 I R 442, 485; *Phillips* v *Blaser* 13 Wash 2d 439, 445, 125 P 2d 291 (1942); *Davis* v *Elba Bank & Trust Co.* 216 Ala 632, 635, 114 So 211 (1927).

Gould wrongfully appropriated to the exclusive benefit of his loan company the ability of Interlake on and after May 29, 1950 to finance itself. 3 abs 220, 221, 254.

When the cash requirements of Interlake for, say, the year following May 29, 1950 are compared with the cash that became available to Interlake during that period from current rents, prepaid rents, and from the sale of Interlake notes it becomes obvious that the only thing wrong with Interlake was a temporary shortage of cash and that with modest financial aid or even tolerance by creditors the May 29, 1950 arrangement would not have been necessary and Interlake would have continued by virtue of its ability to finance itself. 2 abs 121-23, 141; 3 abs 252-54, 379-82.

By May 29, 1950 the unconscionable and shocking commissions which Gould and his loan company charged Lahman or Interlake aggregated not less than $79,038.75, $76,498.75 of which were in connection with collateral note transactions and $2,540 of which were in connection with the exchange. check transactions. The commissions which the loan company charged in connection with the collateral loan transactions amounted to as much as 1,020% per year on the amount loaned and in connection with the exchange check transactions to as much as 3,650% per year on the amount loaned. 3 abs 253.

Lahman testified that by May 29, 1950 those unconscionable and shocking commissions had encroached on his collateral to such extent that it became impossible to remove such collateral from Gould and his loan company and refinance elsewhere—4 abs 136; and that had it not been for such commissions he would have had sufficient equity in his collateral to enable him to carry on with Interlake for another six months or possibly another year. 3 abs 253; 4 abs 135.

Lahman further testified that on May 29, 1950 when Gould told Lahman he wanted Interlake to issue the notes dated May 15, 1950 aggregating $50,000 in face amount and desired the benefit of Lahman's name as president of Interlake in this connection, Lahman told Gould that if Gould would let him have only half of that amount, or $25,000, his problems would be solved for the time being and it would not be necessary for Gould and his loan company to take over. 4 abs 69.

These facts and circumstances raise a very strong presumption, if they do not conclusively establish, that if the loan company had not exacted from Lahman and Interlake the commissions aggregating $79,038.75, or if the loan company had permitted Lahman to have the benefit of only half of the notes dated May 15, 1950 aggregating $50,000 in face amount and carrying the benefit of Lahman's name as president of Interlake, which Gould ap-

propriated for the use and benefit of his loan company, the May 29, 1950 arrangement would not have been necessary, and Interlake would have continued by virtue of its ability to finance itself. 3 abs 254.

By June 26, 1951 the unconscionable and shocking commissions which Gould and his loan company charged Lahman or Interlake aggregated not less than $120,413.75, $102,598.75 of which were in connection with collateral note transactions and $17,815 of which were in connection with exchange check transactions. 1 abs 287, 288.

It is thus apparent that the financial straits of Lahman and Interlake on May 29, 1950 and June 26, 1951 were caused in a substantial degree by the unconscionable and shocking charges which Gould and his loan company exacted for the use of money.

A court of equity will not permit a trustee, fiduciary or confidant to take advantage of the financial straits of his *cestui que trust* brought on by his own unfair conduct. This salutary rule was applied in the important case of *Earll* v *Picken* 113 F 2d 150, 160 (1940 CCA DC) where an able court consisting of Henry W. Edgerton, Fred W. Vinson and Wiley Rutledge joined in an instructive and refreshing opinion dealing with the trust and fiduciary duties and obligations a trustee under a real estate mortgare owes to the debtor. In 1943 Rutledge, the author of the opinion, became associate justice of this Court and in 1946 Vinson became its chief justice.

On May 29, 1950 and June 26, 1951 Lahman was in extremely necessitous circumstances and under equitable duress and assuming Lahman assented to the acquisition of his shares in Interlake and his shares in Frantz by the loan company free and clear of any equity or right of redemption, still a court of equity does not consider the consent thus obtained sufficient to fix the rights of the parties, for necessitous men are not, truly speaking, free men. 3 abs 163-165; *Vernon* v *Bethell* 2 Eden's Chancery 110, 113 (1767); *Miller* v *Cook* L R 10 Eq 641, 646

(1870); *Russell* v *Southard* 53 U S (12 How) 139, 152, 13 L ed 927 (1851); *Fort* v *Colby* 165 Iowa 95, 131, 144 NW 393 (1913); *Cook* v *Wolf* 296 Ill 27, 29 (1921); 3 *Pomeroy's Equity Jurisprudence* (1941 5th ed Symons) sec 948.

The fact that Lahman was thus under equitable duress is established by the record including the testimony of Gould, Mrs. Gould and Lahman. 2 abs 368-70; 3 abs 163-65.

The cases are legion in which a court of equity has held that a pledgor-debtor or mortgagor-debtor, in no more necessitous financial circumstances than was Lahman on May 29, 1950 and June 26, 1951, was under equitable or moral duress and for that reason the chancellor would not hold him bound by a purported conveyance or release to the creditor of his equity or right of redemption but would preserve that equity or right for the debtor. In *Cook* v *Wolf* 296 Ill 27 (1921) the court recognized that the mortgagors were under "equitable duress" and that (p 39)

"necessitous men are not, truly speaking, free men."

In 3 *Pomeroy's Equity Jurisprudence* (1941 5th ed Symons) it is said:

> § 948. *Persons in Vinculis.*—Analogous to the condition of mental weakness is that of pecuniary or other necessity and distress. Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult, and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration, and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively."

"Once a mortgage, always a mortgage" is the rule of equity. The May 29, 1950 and June 26, 1951 arrangements

will be presumed to constitute continuations of security, the equities or rights of redemption which Lahman owned or controlled in respect of his shares in Interlake and his shares in Frantz will be presumed to continue, and defendants have the burden of proving that "both" Lahman on the one hand, and Gould and his loan company on the other, "clearly and unequivocally" understood and intended that those arrangements should cut off and bar Lahman's equities or rights of redemption in respect of such shares; otherwise those arrangements will be regarded as a mere change in the form or character of the security. 3 abs 159-61; *Ennor* v *Thompson* 46 Ill 214, 222 (1867); *Healy* v *Metropolitan Life Insurance Co.* 325 Ill App 697 (1945 1st abs); *Guttenfelder* v *Iebsen* 230 Iowa 1080, 1084, 300 NW 299 (1941); *Koob* v *Zoller* 231 Iowa 1106, 1111, 3 NW 2d 130 (1942); *Davis* v *Wilson* 237 Iowa 494, 498, 21 NW 2d 553 (1946); *Earle's Adm.* v *Blanchard* 85 Vt 288, 294, 81 Atl 913 (1911); *Dickens* v *Heston* 53 Ida 91, 104, 21 P 2d 905 (1933); *Simpson* v *First National Bank of Denver* 93 Fed 309, 311, 314 (1899 CCA 8).

An intent to cut off or bar an equity or right of redemption will not be inferred from equivocal circumstances or loose expressions. The absence in the instruments dated May 29, 1950 and June 26, 1951 of formal transfers of Lahman's equities or rights of redemption leads to the conclusion that no such transfers were intended. *Peugh* v *Davis* 96 U S (6 Otto) 332, 337, 339, 24 L ed 775 (1878).

Form of the instruments employed in May 29, 1950 and June 26, 1951 arrangements does not preclude equity from giving effect to their true purpose. 3 abs 174-76; *Carter Oil Co.* v *Durbin* 376 Ill 398, 410 (1941) certiorari denied 314 U S 644, 86 L ed 517 (1941); *Liskey* v *Snyder* 56 W Va 610, 639, 49 SE 520 (1904); *Hoover* v *Bouffleur* 74 Wash 382, 385, 133 Pac 602 (1913).

Any doubts as to effect of May 29, 1950 and June 26, 1951 arrangements will be resolved in favor of continu-

ance of pledgor-pledgee relationship and preservation of Lahman's equities or rights of redemption. 3 abs 174-76; *Russell* v *Southard* 53 U S (12 How) 139, 149, 13 L ed 927 (1851); *Thomas* v *Klemm* 185 Md 136, 141, 43 A 2d 193 (1945); *Gassert* v *Strong* 38 Mont 18, 37, 98 Pac 503 (1908); *Young* v *Miner* 141 Wis 501, 509, 124 NW 660 (1910); *Niggeler* v *Maurin* 34 Minn 118, 122, 24 NW 369 (1885); *Dibert* v *D'Arcy* 248 Mo 617, 644, 154 SW 116 (1913); *Eppert* v *Lowish* 91 Ind App 231, 236, 168 NE 616 (1929) rehearing denied 91 Ind App 231, 169 NE 884 (1930).

Where evidence is conflicting as to whether pledgor or mortgagor intended that transaction should cut off or bar his equity or right of redemption, the court will preserve the equity or right of redemption unless evidence clearly preponderates against such result. 3 abs 227, 228, 318, 319; *Cook* v *Wolf* 296 Ill 27 (1921); *Carter Oil Co.* v *Durbin* 376 Ill 398 (1941) certiorari denied 314 U S 644, 86 L ed 517 (1941); *Smith* v *Farmers and Merchants Bank* 398 Ill 239 (1947); *Rubo* v *Bennett* 85 Ill App 473 (1899 1st); *Bane* v *Pritchett* 233 Ill App 617 (1921 2d); *Healy* v *Metropolitan Life Insurance Co.* 325 Ill App 697 (1945 1st abs); *Hush* v *Reaugh* 23 F Supp 646 (1938 DC Ill); *Peugh* v *Davis* 96 U S (6 Otto) 322, 24 L ed 775 (1878); *Simpson* v *First National Bank of Denver* 93 Fed 309 (1899 CCA 8); *Beeler* v *American Trust Co.* 24 C 2d 1, 147 P 2d 583 (1944); *Ver Straten* v *Worth* 79 Colo 30, 243 P 1104 (1926); *Dickens* v *Heston* 53 Ida 91, 21 P 2d 905 (1933); *Fort* v *Colby* 165 Iowa 95, 144 NW 393 (1913); *Baugher* v *Merryman* 32 Md 185 (1869); *Niggeler* v *Maurin* 34 Minn 118, 24 NW 369 (1885); *Kohler* v *Gilbert* 216 Or 483, 339 P 2d 1102 (1959); *Gould* v *McKillip* 55 Wyo 251, 99 P 2d 67 (1940).

The attitude of equity in this respect is well expressed by the court in *Simpson* v *First National Bank of Denver* 93 Fed 309 (1899 CCA 8) as follows at page 314:

> "Now, the burden of establishing this agreement, of proving this meeting of the minds of the parties, was upon the bank. Not only this, but the relation of debtor and creditor, and the relation of mortgagor and mortgagee, existed between Simpson and the bank before and at the time of the transaction of March 2, 1887; so that there was a legal presumption that these relations continued, and that any transfers or conveyances of property from the debtor to the creditor were made, not in payment of, but as further security for, the debt. It necessarily follows that a bare preponderance of evidence of an agreement of sale was insufficient to discharge the burden which rested upon the bank. Substantial and persuasive evidence of the meeting of the minds of the parties upon the terms of the sale was required to overcome the legal presumption, and to establish the fact. This requirement was not met by the testimony for the bank. It produced but one witness to the contract, and he was contradicted by the appellant. Thus, the sale was left upon the oral testimony, with the legal presumption against it, and no preponderance of testimony in its favor."

Here defendants produced but one witness to the May 29, 1950 and June 26, 1951 arrangements, namely Gould, and he was contradicted by Lahman, and this is not sufficient to discharge the burden on defendants to produce "substantial and persuasive evidence" to overcome the legal presumption that the pledgor-pledgee relation continued.

Assuming without admitting that there was not any oral understandings or agreements between the parties and that "both" parties "clearly and unequivocally" understood and intended that the May 29, 1950 and June 26, 1951 arrangements should be regarded as absolute sales by Lahman to the loan company of his shares in Interlake and his shares in Frantz which would cut off or bar Lahman's equities or rights of redemption in respect of those shares, for reasons hereinabove and hereinafter set forth defendants have not sustained their further burden

of proving that degree of good faith and fair play which the law requires on the part of Gould and his loan company to sustain the validity of the transactions:

—Fairness of May 29, 1950 arrangement

On May 29, 1950 $950,000 would not have been a fair price for the assets of or shares in Interlake. 3 abs 229, 230.

It is not Lahman's burden to prove that on May 29, 1950 Lahman's shares in Interlake were worth in excess of what defendants contend the loan company paid for those shares. But is defendants' burden to prove that those shares were not worth substantially more than the net amount which the loan compaiy paid for them and in determining what the loan company paid and what Lahman received, any obligations or burdens which Lahman retained or assumed must be taken into consideration. 3 abs 234; *Lewis* v *Wells* 85 Fed 896, 902 (1898 DC Alaska).

In 1944 the Rockdale properties were acquired by the U. S. for the department of Navy as a storage facility. During 1944 and 1945 the Navy constructed some 20 new buildings and other improvements thereon and improved and rehabilitated existing buildings. The aggregate amount paid by the U. S. for the land and existing buildings and improvements and for new buildings and improvements exceeded $2,600,000. px 144; 1 abs 178; 2 abs 197, 198.

In 1947 the Rockdale properties were declared surplus to the WAA and assigned to the regional director Chicago Illinois for liquidation and disposal. px 144; 1 abs 178, 2 abs 198.

In the fall of 1947 the WAA assigned Bjork, one of its valuation engineers—who testified for Lahman in these proceedings—to make an appraisal of the fair market value of the Rockdale properties. Bjork appraised the value of the Rockdale properties as of November 1947 to be $1,508,000 and so advised the WAA and its appraisal

division. The WAA and its appraisal division, after considering Bjork's appraisal of $1,508,000, approved and accepted it. Thereafter the WAA offered the Rockdale properties for sale under and subject to the surplus property act of 1944. (58 *Stat* 765; U S Code Cong Service 1944 p 764) as amended and rules and regulations issued thereunder. px 144; 1 abs 178; 2 abs 198, 199.

Considering the facts that during 1944 and 1945 the U. S. expended more than $2,600,000 for the Rockdale properties, that in November 1947 the WAA through its then valuation engineer Bjork objectively appraised the properties at $1,508,000, that defendants' witness Hornoff testified that the May 29, 1950 reconstruction cost of the buildings on the Rockdale properties was in the neighborhood of $3,500,000—4 abs 476, and that Bjork testified that the May 29, 1950 reconstruction costs of the buildings was $3,918,757—4 abs 533; px 144 pp 20, 21; px 157, it is obvious that the sale of the properties in February 1949 to Lahman and Brubaker for $875,000 payable over ten years with interest at 4% per year constituted a real bargain, as is not uncommon in respect of liquidation of war surplus properties—and no one knew this better than Gould.

Both Bjork and Hornoff testified that the February 24, 1949 sale of the Rockdale properties for $875,000 was not evidence of the true value of those properties. 4 abs 480, 558, 586, 587; 3 abs 100, 101.

Bjork appraised the May 29, 1950 value of the Rockdale properties to be $1,541,920. 4 abs 529, 532. The exceptional qualifications of Bjork to make that appraisal appear at 4 abs 515-55.

The rents derived from the Rockdale properties on May 29, 1950 were abnormally low and were so recognized by both Gould and Bjork. 3 abs 36, 37. Stringfellow testified that the 11-months period prior to May 29, 1950 during which the Rockdale properties were in operation

was too short to serve as a reliable indication of Interlake's earning power and Gould agreed. px 89; px 3; 3 abs 87.

In 1949 and again in early 1950 Gould indicated that in his opinion the rental value of the Rockdale properties was from 60 to 80 cents per square foot per year. px 43; 3 abs 41; 4 abs 38. The average of these figures or 70 cents per square foot per year would result in a May 29, 1950 fair cash market value of the Rockdale properties in excess of $2,000,000 using the formula used by defendants' witness Hornoff. 3 abs 79, 80.

Evidence in the record indicates that the May 29, 1950 fair cash rental values of the Rockdale properties ranged from 64½ to 85 cents per square foot per year and that these rents indicate May 29, 1950 fair cash market values of the Rockdale properties from $1,911,042 to $2,867,372 when defendants' witness Hornoff's formula is applied to those rental values. 3 abs 79, 80.

The 1951-52 net incomes from the Rockdale properties indicate May 29, 1950 fair cash market values of the Rockdale properties of $1,677,318 and $2,356,088 when defendants' witness Hornoff's 7% capitalization rate is applied to those net incomes. 3 abs 80, 81.

Evidence in the record indicates May 29, 1950 fair cash market value of the Rockdale properties ranging from $2.86 to $3.99 per square foot of floor area and May 29, 1950 fair cash market values of the Rockdale properties ranging from $1,976,500 to $2,750,514. 3 abs 82, 83.

Rental values of the Rockdale properties indicated by evidence in the record indicate May 29, 1950 values of Interlake shares over and above the $760,000 balance of purchase price ranging from $562,632 to $909,446 when defendants' witness Stringfellow's 4.8 price-earnings ratio is applied to those rental values. 3 abs 94.

Martin appraised the May 29, 1950 value of the Rockdale properties but defendants refused to produce Martin's appraisal. 3 abs 103, 104; 4 abs 302, 303, 308.

In early 1954 Gould refused to sell the Interlake properties for $3,000,000 and offered to sell them for $5,000,000. 4 abs 93, 94, 419-24; 3 abs 355-57, 363-68; 2 abs 369-74.

Bjork's November 1947 official and impartial appraisal of the Rockdale properties at $1,508,000 made without view to litigation is entitled to special credence. Bjork's May 29, 1950 appraisal was $1,541,920, only $33,920 higher than his November 1947 appraisal. On May 29, 1950 the Rockdale properties were physically substantially the same as they were in November 1947. px 144; 1 abs 179. The increase in vaue of $33,920 was justified by the $70,000 expended for repairs and improvements, appreciation in value of industrial buildings generally, and increase in their construction costs. px 144; 1 abs 179. Bjork's May 29, 1950 appraisal of the Rockdale properties at $1,541,920 is also entitled to special credence.

The testimony and appraisal of defendants' witness Hornoff are replete with errors and weaknesses. 3 abs 32, 33, 47-52, 57-78.

Defendants' contention that on May 29, 1950 the Rockdale properties were worth no more than $885,000 if accepted would lead to the conclusion that Interlake was then insolvent. This conclusion is belied by the facts including the fact that shortly before, on and shortly after May 29, 1950 Gould and his loan company sold over $50,000 in face amount of Interlake's collateral notes to the public at par "without recourse". 2 abs 178, 179. The court should not permit defendants to contend that Gould and his loan company were defrauding the public.

The manifest weight of evidence in the record shows that the May 29, 1950 fair cash market value of the Rockdale properties and other assets of Interlake was in the neighborhood of $1,548,147 and that apart from any credit or reduction on account of the unconscionable and shocking commissions charged by the loan company, the May 29, 1950 fair cash market value of Interlake was in the neighborhood of $491,776 over and above Interlake's liabilities of $1,056,371.

Defendants contend that by the May 20, 1950 arrangement the loan company acquired Interlake having assets worth $1,548,147 for $950,000, or acquired all the shares in Interlake worth $609,147 for $11,000, free and clear of any equity or right of redemption or other claim.

The loan company did not pay $950,000 for the shares in Interlake. 3 abs 230-34.

The loan company advanced to Lahman not more than $105,880 cash on the $168,140 of notes outstanding May 29, 1950 which defendants contend were turned back to Lahman at par in part payment of the $950,000 so-called purchase price for the Interlake shares. The difference of $62,260 represented commissions charged by the loan company.

The loan company sold $86,300 in face amount of the $168,140 of notes to the public at par "without recourse" and realized $86,300 in cash, leaving only $19,580 which the loan company had invested in the $168,140 of notes as of May 29, 1950.

Moreover it was Interlake not Gould or his loan company that paid off the $168,140 of outstanding notes as well as the $760,000 balance of purchase price of the Rockdale properties and interest on these items.

Without taking into consideration the $86,300 which the loan company realized from sale of notes to the public it appears that on defendants' theory of the May 29, 1950 arrangement the loan company paid Lahman $62,260 less than the $950,000 value Gould himself placed on the Interlake shares for the purposes of the May 29, 1950 arrangement.

The fact is all that Gould or his loan company paid under the May 29, 1950 arrangement for Interlake shares which Gould himself valued at $950,000 was the $19,580 which the loan company had invested in Interlake as of May 29, 1950 and the $11,000 referred to in the first informal 1-page letter dated May 29, 1950—total $30,580.

Thus Gould or his loan company paid only $30,580 of the so-called $950,000 purchase price and Interlake, Lahman's corporation, paid the other $919,420 and interest.

What Lahman received under the May 29, 1950 arrangement was not a fair *quid pro quo* for what he parted with and the burdens he retained and assumed thereunder. 3 abs 234, 235; 2 abs 394, 395.

Defendants have not shown that Gould's undertaking to turn back notes totaling $179,000 was of any value to Lahman. 3 abs 234. All of these notes and interest thereon were later paid by Interlake not Gould or his loan company.

It is true that Lahman received $11,000 cash but he used most, if not all of this to pay creditors of Interlake— 4 abs 80; 3 abs 212, 213, and under defendants' theory of the May 29, 1950 arrangement Lahman became obligated:

1.	To acquire and turn over to loan company Interlake shares held by the minority shareholders which cost Lahman	$ 35,000
2.	To pay Interlake's unsecured creditors which cost Lahman not less than	53,020
3.	To release and contribute to Interlake amounts due Lahman from Interlake	64,350
4.	To turn over to loan company 375 preferred shares in Interlake which according to Bjork's appraisal were worth	37,500
5.	To turn over to loan company 85% of common shares in Interlake which according to Bjork's appraisal were worth	362,760
	Total	$552,630

Lahman also remained personally liable for the $760,000 balance of the purchase price of the Rockdale properties and interest thereon. 2 abs 242.

Lahman and Gould worked out the terms of the May 29, 1950 arrangement under mutual mistake of fact that Interlake owed its general creditors whom Lahman agreed to pay not more than $20,000 whereas Interlake owed those creditors about $60,000. 3 abs 241.

Lahman, Gould and Mrs. Gould all testified that on May 29, 1950 the amount which Interake owed its general creditors whom Lahman agreed to pay was not known. 4 abs 67, 278, 279 381. The parties assumed the amount would not exceed $20,000 but it turned out to be about $60,000. 4 abs 278, 279; 3 abs 241.

By May 29, 1950 Lahman had devoted 11 months to getting the Rockdale properties project under way. He had toiled and dedicated himself to the project without compensation or reimbursement for substantial expenses. In addition he had invested not less than $47,000 in Interlake shares and had used not less than $64,350.36 of his personal funds for the benefit of Interlake making a total of not less than $111,350.36. 2 abs 253, 254, 262; px 91. By the May 29, 1950 arrangement Gould required Lahman to obligate himself to pay not less than $53,807.73 of Interlake's liabilities and $33,000 to acquire the minority shares and turn them over to the loan company making a grand total of not less than $197,371.09 that Lahman personally dedicated to the project.

Interlake had paid $115,000 principal on the purchase price of the Rockdale properties, another $70,000 for rehabilitating the properties and had sustained a $64,252.08 operating loss making a grand total of not less than $249,-252.08 that Interlake had in the project. 2 abs 262, 264.

As of May 29, 1950 the public had $86,300 invested in the project by reason of having purchased from the loan company at par "without recourse" $86,300 of the $168,-140 outstanding collateral notes.

On the other hand as of May 29, 1950 Gould and his loan company had only $19,580 invested in the Rockdale properties project consisting of the $105,880 which the loan company originally advanced to Lahman or Interake on the $168,140 of collateral notes less the $86,300 which the loan company realized from sale of notes to the public.

By the latter part of May 1950 Lahman and Interlake were temporarily out of cash and needed funds to meet

payroll and $10,000 principal and $7,600 interest payments due the U. S. June 21, 1950 on the purchase price of the Rockdale properties.

Under these circumstances Lahman went to Gould for financial help. He needed only about $19,000 or $20,000 of temporary financing. Gould refused stating that his loan company was short of available cash and that Lahman did not have sufficient collateral.

Gould did not suggest that Lahman ask the U. S. to grant indulgence and extend time of payment of the principal and interest on the purchase price; Gould did not suggest that Lahman get any other person to take over the Rockdale properties project and its obligations, which obligations defendants now pretend Gould feared; Gould did not suggest extension of time of payment of the outstanding collateral notes; Gould did not disclose that a substantial part of the collateral notes were not owned by the loan company but were held by the public and he did not suggest that Lahman contact the noteholders for discussions and possible financial aid; Gould refused to become a 50-50 partner with Lahman in which case Lahman would have retained a half interest in the valuable Rockdale properties project and Gould would have had to worry about only half of its obligations which defendants now pretend Gould feared; Gould did not suggest that Lahman try to get temporary financial aid elsewhere; Gould did not suggest that Lahman attempt to get any of the lessees to pay rent in advance; Gould did not suggest that Lahman, himself, cause Interlake to issue and sell additional collateral notes; in short, Gould did none of the things he would have done had he not, in fact, wanted to take over the Rockdale properties project for his loan company—his conduct conclusively shows he wanted the Rockdale properties himself and schemed to get them.

Accordingly, Gould told Lahman that financial assistance would be forthcoming only on condition that Lahman turn over to Gould's loan company 100% of the outstand-

ing shares in Interlake and put Gould in control. Lahman obeyed and the May 29, 1950 arrangement was worked out.

But what was the nature of the financial assistance and from whence did it come?

It came not from Gould or his loan company, but from Interlake itself—Lahman's corporation—and in the form of advanced or anticipated rents amounting to $73,400 under the International Harvester Company lease—a lease which Lahman himself obtained. As of May 29, 1950 the future rents payable under this lease aggregated $465,-993.33—2 abs 263, and by May 9, 1951 $29,400 of these rents had been paid in advance. 2 abs 290. In addition, as part of the May 29, 1950 arrangement Gould, without prior notice to Lahman, required Interlake to issue $50,000 of additional collateral notes dated back to May 15, 1950 signed by Lahman as president and secured by rent payable in the future under the International Harvester Company lease. 2 abs 274-76. Shortly thereafter $44,000 in face amount of these notes were sold to the public at par and Interlake realized $44,000 in cash therefrom. 2 abs 286. These notes were simply a device used by Gould to anticipate an additional $44,000 of the future rents payable under the International Harvester Company lease. This $44,000 and the above-mentioned $29,400, total $73,-400, of advanced or anticipated rents provided all the financing that Interlake needed.

The issuance by Interlake of the additional $50,000 of notes, dating them back to May 15, 1950 and having them signed by Lahman as president, was solely Gould's idea, unexpectedly sprung on Lahman in the privacy of Gould's office after the first informal 1-page letter dated May 29, 1950—appendix 18—had been dictated and was being typed. When Lahman suggested that if Gould would let him have only half of the $50,000, that would solve Lahman's problems, Gould put on the pressure, threatened to

withdraw all support, and mentioned the possibility of bankruptcy for Lahman, and assured Lahman that he could trust Gould as he had in the past. 2 abs 274-76.

Neither Gould nor his loan company assumed or became personally liable for the $760,000 balance of the purchase price of the Rockdale properties or for the $168,140 face amount of notes outstanding May 20, 1950 or for the $50,000 of additional collateral notes dated May 15, 1950. 3 abs 221-23, 351-55. Lahman remained personally liable for the $760,000 purchase price balance and liable as co-maker or endorser of the $168,140 face amount of notes.

Immediately after May 29, 1950, under the management of general superintendent Martin whom Gould inherited from Lahman, the Rockdale properties produced very high rents and net earnings. Within less than a year the Rockdale properties were producing net profits of more than $112,493 per year. 2abs 190, 191. During the 5½ years following May 29, 1950 Interlake, as a result of Lahman's groundwork and expenditure of practically all his assets, received gross rents aggregating $2,546,032.40—4 abs 306, 307, and $44,000 from the sale of the notes dated May 15, 1950, total $2,590,032.40, out of which Interlake, not Gould or his loan company, paid the $760,000 purchase price balance to the U. S. and the $168,140 of outstanding collateral notes and interest on both. Indeed shortly after May 29, 1950 Interlake became so flush with its own money that by 1952 it had actually prepaid $119,531.25 of the purchase price of the Rockdale properties. 2 abs 291-93.

There is not a scintilla of evidence that after May 29, 1950 either Gould or his loan company put one red cent of his or its own funds into the Rockdale properties project or that Gould, who had not had any experience in the warehousing business — 3 abs 196, was in anyway responsible for any new leases or for Interlake's financial success. The simple fact is that on May 29, 1950, due to Lahman's efforts for 11 months and the substantial outlay of his personal funds, Interlake was on the verge of

realizing the large cash flow from rents and consequent handsome profits and was in position to finance itself with very little temporary financing. Gould schemed to reap the harvest to the exclusion of Lahman.

There is no doubt that Gould was well aware of the potential value of the Rockdale properties, that he looked on them with a "covetous eye" and involved himself in financing the project in the hope that Lahman would come to the end of his rope and Gould could take over. The exactions of unconscionable and shocking commissions for use of money and insistence that Interlake assume over $70,000 of Lahman's personal collateral notes as they matured and were extended, were parts of his *modus operandi*. 2 abs 202, 203, 217, 252; 3 abs 101-11, 218-23, 379-85.

After May 29, 1950 Lahman's assets, earnings or ability to repay money did not increase or improve, but on defendants' theory of the May 29, 1950 arrangement Lahman's net worth was substantially decreased. Nevertheless promptly after May 29, 1950 and during the period from July 20, 1950 to November 12, 1953 the loan company engaged in some 25 loan transactions evidenced by collateral or judgment notes in which the loan company advanced Lahman cash aggregating $129,049 for which the loan company exacted commissions aggregating $33,963 and during the period from June 14, 1950 to May 6, 1952 the loan company engaged in some 95 exchange check transactions with Lahman in which it exacted commissions aggregating $17,630. These facts put the lie to defendants' contentions that on May 29, 1950 Gould considered Lahman and Interlake hazardous risks and for this reason refused to extend them even modest temporary financing, and point up the extreme inequity in Gould's conduct. 3 abs 379-83.

As defendants have not sustained their burden of proving that degree of good faith and fair play on the

part of Gould and his loan company to sustain the May 29, 1950 arrangement as an absolute sale by Lahman to the loan company of his shares in Interlake which would cut off or bar Lahman's equity or right of redemption in respect of those shares, the loan company holds property—650 preferred and 10,000 common shares in Interlake—which it ought not in equity and good conscience hold and enjoy, and holds those shares subject to Lahman's equity or right of redemption or as constructive trustee for the benefit of Lahman. 3 abs 258, 259.

—Fairness of June 26, 1951 arrangement

On June 26, 1951 $119,100 or some lesser amount would not have been a fair price for Lahman's 117.2 shares in Frantz. 3 abs 111-19, 271, 272.

It is not Lahman's burden to prove that on June 26, 1951 Lahman's 117.2 shares in Frantz were worth a specified figure in excess of what defendants contend the loan company paid for the shares. It is defendants' burden to prove that these shares were not worth substantially more than what the loan company paid for them.

On defendants' theory of the June 26, 1951 arrangement defendants may contend that any one of the following three amounts was the "price" the loan company paid for Lahman's 117.2 shares in Frantz:

1. Either $119,100, or $1,016.21 per share, which consisted of the $104,100 in face amount of collateral notes outstanding June 26, 1951 and $15,000 cash;

2. Or $117,200, or $1,000 per share, which was the "price" specified in the first informal 1-page letter dated June 26, 1951—appendix 20, and which consisted of the $104,100 in face amount of collateral notes less $1,900 discount and $15,000 in cash;

3. Or $110,000, or $938.56 per share, which was the "price" specified in the second informal 1-page letter dated June 26, 1951—appendix 21, and which consisted of the $104,100 in face amount of collateral notes less $9,100 discount and $15,000 cash.

The fact that Gould and his loan company were willing to discount the $104,100 of outstanding notes $9,100 is an admission that these notes were not worth par.

The Frantz company was founded in 1909 and for many years has been engaged in the manufacture and sale of builder's hardware, overhead garage doors and other items with its principle plant and place of business in Sterling, Illinois. 4 abs 2, 7, 603.

The earnings of Frantz were remarkable. For the 5 fiscal years ending June 30, 1947 to June 30, 1951 the average net earnings after taxes of Frantz were $174.81 per share per year; the average dividends paid were $44 per share per year; and the average net earnings retained were $130.81 per share per year. px 223; 1 abs 214, 215. During the three calendar years 1951, 1952 and 1953 Frantz paid dividends of $80 per share per year. 4 abs 604. During the fiscal year ending June 30, 1951 Lahman's 117.2 shares in Frantz earned $190.59 per share after taxes, or a total of $22,337.15. px 223; 1 abs 214, 215. In 1951 Lahman's 117.2 shares in Frantz were paying dividends at the rate of $80 per share per year or $20 per quarter, or a total of $9,376 per year or $2,344 per quarter. 4 abs 604.

The Goulds though the Frantz shares were "gilt edge" security. 4 abs 352.

In December 1949 Gould wrote a letter to Lahman indicating a value of Frantz shares of $1,800 per share. px 72; 1 abs 160; 3 abs 113.

In June 1951 in notes nos. 1931 to 1980 aggregating $45,000 in face amount the loan company represented the Frantz shares to have a book value of $1,150 per share and an earning value much higher—px 22; 1 abs 145; and shortly thereafter the loan company endorsed $34,000 in face amount of such notes "without recourse" and sold them to the public at par. 3 abs 113.

In January 1951 in notes nos. 1876 to 1887 aggregating

$12,000 in face amount the loan company represented that the Frantz shares were worth $1,500 per share. px 22; 1 abs 144; 3 abs 113, 114; 4 abs 608, 609.

On the witness stand Gould admitted the Frantz shares were probably worth $1,500 per share and not less than $1,200 per share. 4 abs 225, 226.

On the question of the June 26, 1951 value of Lahman's 117.2 shares in Frantz we are fortunate to have in the record the appraisal and testimony of the disinterested and well qualified witness, A. H. Prestin. 4 abs 612-17. Prestin had been with Frantz for 45 years. For a period of 10 years prior to June 1951 he was general manager and had charge of everything, all different departments. He was a director and had been secretary of the corporation. 4 abs 612. Prestin was familiar with the earnings of Frantz and dividends paid. He was familiar with the assets and liabilities of Frantz as of June 26, 1951. 4 abs 612, 613. As of June 26, 1951 Prestin was a shareholder in Frantz, and knew how the shares in this closely held corporation were held for a period of 10 years prior thereto. 4 abs 613. Prestin testified that on June 26, 1951 Lahman's shares in Frantz were worth 10 times earnings or a little more than $1,500 per share. 4 abs 613.

Lahman appraised the June 26, 1951 value of Frantz shares at not less than $1,500 per share. 4 abs 606, 618. Lahman had been with Frantz for 30 years, was a substantial shareholder, was familiar with the earnings, dividends, property, assets and liabilities of Frantz as of June 26, 1951-4 abs 605, 606, and was well qualified to know the value of the Frantz shares as of that date.

In November 1959 Frantz split its shares by issuing a little over 176 new shares for each old share and since then there have been plenty of new shares sold at $15 per share or $2,640 per old share. 4 abs 614, 615.

During the period from August 1950 to July 1951 the loan company endorsed "without recourse" and sold to the

public at par some $72,000 in face amount of the collateral notes secured by Lahman's 117.2 shares in Frantz. Assuming these were 60% loans, this would indicate Lahman's 117.2 shares in Frantz were worth $1,480 per share or $173,500. px 100, 101; 2 abs 180.

Defendants did not offer any appraisal of the June 26, 1951 value of the Frantz shares.

The manifest weight of evidence in the record shows that the June 26, 1951 fair cash market value of Lahman's 117.2 shares in Frantz was $1,500 per share or $175,800.

Defendants contend that by the June 26, 1951 arrangement the loan company acquired these 117.2 shares worth $175,800 for the $104,100 in face amount of notes then outstanding and $15,000 cash or a total of $119,100 free and clear of any equity or right of redemption or other claim.

The $175,800 value of Lahman's 117.2 shares in Frantz exceeded the $119,100 by $56,700 if the $26,100 commissions contained in the $104,100 of outstanding notes were not excluded or by $82,800 if such commissions were excluded.

The loan company did not pay in excess of $93,000 for Lahman's 117.2 shares in Frantz worth not less than $175,800. 3 abs 272, 273.

The loan company advanced to Lahman not more than $78,000 cash on the $104,100 of notes outstanding June 26, 1951 which defendants contend were turned back to Lahman at par in part payment of the so-called purchase price ranging from $110,000 to $119,000 for Lahman's shares in Frantz. The difference of $26,100 represented commissions charged by the loan company.

Thus Gould or his loan company paid no more than $93,000—$78,000 plus the $15,000 referred to in the informal 1-page letters dated June 26, 1951—for Lahman's 117.2 shares in Frantz worth not less than $175,800.

The $93,000, which under defendants' theory was the most that Gould or his loan company paid for Lahman's

117.2 shares in Frantz, was $17,000 less than the $110,000 which was the lowest value that Gould and his loan company placed on such shares for the purposes of the June 26, 1951 arrangement.

As defendants have not sustained their burden of proving that degree of good faith and fair play on the part of Gould and his loan company to sustain the June 26, 1951 arrangement as an absolute sale by Lahman to the loan company of his 117.2 shares in Frantz which would cut off or bar Lahman's equity or right of redemption in respect of those shares the loan company holds property—Lahman's 117.2 shares in Frantz or new shares which now represent those 117.2 shares—it ought not in equity and good conscience hold and enjoy, and holds those shares subject to Lahman's equity or right of redemption or as constructive trustee for the benefit of Lahman. 3 abs 279. 280.

Additional patent errors, defects and omissions in Illinois appellate court opinion

In *Brubaker* v *Gould* 34 Ill App 2d 421 (1962) the nature and effect of the May 29, 1950 arrangement was directly in issue before the Illinois appellate court, first district, first division. As appears at pages 432 and 433 of the first division's opinion, in that case Lahman there, as here, testified that the May 29, 1950 arrangement was understood to be a further collateral protection for the loan company and an accounting would be made from time to time. There, as here, Gould denied Lahman's testimony. In the *Brubaker case* the first division at pages 432 and 433 of its opinion found this issue in favor of Lahman and that a reasonable conclusion from this evidence is that Lahman had an oral agreement with Gould that the Interlake shares were to be only additional collateral for Gould and Lahman believed he would ultimately recover all the Interlake shares from Gould.

In the instant case the Illinois appellate court, first district, second division, found against Lahman on this issue. Thus there exists a conflict between the decision sought to be reviewed and a decision of another division of the Illinois appellate court.

Admittedly on May 29, 1950 and on June 26, 1951 the relationships of pledgor-pledgee and equitable mortgagor-mortgagee existed between Lahman and Interlake on the one hand and the loan company on the other. Defendants' contention that the loan company purchased the pledged or mortgaged property free and clear of any equity or right of redemption places the loan company squarely in the position of a pledgee or mortgagee who claims to have purchased the pledgor's or mortgagor's equity or right of redemption in lieu of foreclosure and brings into operation the rules of good faith and fair play announced and applied in *Carter Oil Co.* v *Durbin* 376 Ill 398, 34 NE 2d 407 (1941) certiorari denied 314 US 644, 86 L ed 517 (1941) which applied rules that have been enforced by this Court for a hundred years. *Villa* v *Rodriguez* 79 US (12 Wall) 323, 20 L ed 406 1870.

The Illinois appellate court completely ignored the pledgor-pledgee and equitable mortgagor-mortgagee relationships that existed between the parties and made the astounding statement that no "relationship other than debtor and creditor existed."

The Illinois courts have thus avoided testing the May 29, 1950 and June 26, 1951 transactions by the rules of good faith and fair play by which this court has held they must be tested, and there exists a conflict between the Illinois court decisions sought to be reviewed and the decisions of this Court.

As to the unconscionable and shocking commissions exacted by Gould and his loan company—supra 30 to 35, the Illinois appellate court not only inaccurately stated that the commissions in the collateral note transactions averaged about 20% per loan, but also neglected to

state that the collateral loans in which the commissions happened to be about 20% were all short term loans ranging from 30 to 90 days duration. Moreover the Illinois appellate court completely ignored the cruel commissions exacted in the exchange check transactions. supra 32 to 35.

The record conclusively shows that the exactions made in collateral note transactions amounted to more than 50% per year on the amount loaned and in the exchange check transactions amounted to more than 400% per year on the amount loaned. supra 30 to 35.

Under the decisions of the great chancellors of England and Ireland, which have been followed in Illinois and by this Court—*Miller* v *Cook* L R 10 Eq 641 (1870); *Earl of Aylesford* v *Morris* L R 8 Chanc App 484 (1872-73); *Kevans* v *Joyce* [1896] 1 I R 442; *Ball* v *Leonard* 24 Ill 146, 148 (1860); *Woodworth* v *Huntoon* 40 Ill 131, 138 (1865); *Jenkins* v *Greenbaum* 95 Ill 11, 19, 20, 23, 24 (1880); *Higgins* v *Lansingh* 154 Ill 301, 361, 369, 373 (1895)—Lahman is entitled to relief against the unconscionable and shocking exactions by having the indebtedness scaled down to the amount actually advanced by Gould and his loan company plus interest at the legal rate of 5% per year, and the application of all exactions in excess of 5% per year to reduction of principal. 3 abs 184-94, 319-26.

Kevans v *Joyce* [1896] 1 I R 442 involved many of the elements of the instant case and we urge the court to examine it. 3 abs 188-90, 248, 249.

The Illinois appellate court completely ignored the important bearing the unconscionable and shocking commissions have on various issues in this case.

The Illinois appellate court passed on the May 29, 1950 and June 26, 1951 arrangements as though Lahman was an astute businessman freely dealing with Gould on an equal footing and at arm's length, whereas the record

shows that Lahman was in extremely necessitous circumstances and under equitable duress, was distraught and "at the end of the rope", was alone in Gould's private office without legal or independent advice and was like putty in the hands of the dominant Gould; and as the court found in the *Brubaker case* 34 Ill App 2d 421, 434 (1962) Gould's domination of Lahman was so complete that Gould used Lahman as his "tool".

As to the May 29, 1950 value of the Rockdale properties and Interlake shares and the June 26, 1951 value of Lahman's 117.2 shares in Frantz, the manifest weight of evidence is in favor of Lahman and this includes the prelitigation appraisals made by Gould himself when he had no reason to lie. supra 72-77, 83-87. The Illinois appellate court either entirely ignored this evidence favorable to Lahman or used unsound or unfair statements or arguments to avoid or counteract the effect thereof.

Comparison of the Illinois appellate court opinion with statement of facts and points set forth above reveal that the appellate court overlooked or ignored, in addition to the matters hereinbefore mentioned, many facts and circumstances, rules as to burden of proof, presumptions and equitable principles favorable to Lahman which he is entitled to have considered and applied and the facts and rights of the parties ascertained and adjudicated accordingly.

The decision of the appellate court is contrary to the evidence as well as the manifest weight of the evidence and contrary to law and equity.

—The rulings of the Illinois courts bring this case within the jurisdiction of the supreme court of the United States

Under the rulings of the Illinois courts Lahman, his estate and his creditors stand adversely affected by the tainted findings and conclusions of the master who throughout the crucial decision-making period while Lahman's rights were before him for adjudication was in effect on defendants' payroll with a *"guarantee"* by the

loan company that the loan company would pay all his fees, pursuant to which guarantee the master received from defendants four secret payments aggregating $20,000. Thus Lahman, his estate and his creditors are deprived of procedural due process of law guaranteed by section 1 amendment XIV of the United States constitution.

The Illinois appellate court held that rule 9.3 of rules of circuit court of Cook county Illinois by implication excludes the remedy of suppression of the master's reports for wrongful conduct of the master. Rule 9.3 as applied and enforced by the Illinois appellate court is unconstitution as violative of the due process clause of section 1 amendment XIV of United States constitution.

The rulings of the Illinois courts clearly bring the case within the jurisdiction of this court under § 1257(2) 28 US Code and the rulings of this court in cases cited above at page 17.

This court should take jurisdiction of this case to the end that Lahman, his estate and his creditors may obtain a fair hearing consistent with due process of law and to the end that the rights of the parties may be adjudicated on the basis of the record entirely uninfluenced by the tainted findings and conclusions of the master or of the Illinois courts which in substantial degree are based on those tainted findings and conclusions of the master.

Respectfully submitted,

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attorney for appellant

DEFINITIONS

As used in above and foregoing jurisdictional statement and in the record the following names, terms, expressions and abbreviations will have the meanings hereinafter indicated and in some instances identifying and explanatory matter is set forth:

"Abraham"—Arthur Abraham

Attorney Abraham with attorney Dordek was attorney for defendants in these proceedings until August 1, 1962 when the Winston firm was substituted as attorneys for defendants in lieu of Abraham and Dordek. Since May 1960 Abraham and Dordek have officed together and have been associated in the practice of law. 1 abs 135; 2 abs 516.

"Bjork"—David T. Bjork

Bjork was former valuation engineer for WAA and in that capacity in November 1947 appraised the fair cash market value of the Rockdale properties at $1,508,000.

In these proceedings Bjork testified for Lahman that the May 29, 1950 fair cash market value of the Rockdale properties was $1,541,920.

"Cherkas"—Byron S. Cherkas

Cherkas was a certified public accountant who had an office at 100 North La Salle street Chicago. In April 1951 the loan company employed him to audit and oversee its books and later to oversee the books and records of Interlake. He was in the loan company's office on the average of once a week and really kept a continuous audit of its books and records. He continued in that capacity until the end of 1956 when he moved to Miami Florida. 4 abs 292-94.

"Dordek"—Israel Dordek

Attorney Dordek with attorney Abraham was attorney for defendants in these proceedings until August 1, 1962 when the Winston firm was substituted as attorneys for defendants in lieu of Abraham and Dordek. Dordek is presently counsel for defendant, loan company, and does some work for them. Dordek is also attorney for the estate of W. E. Gould, deceased, which is still pending in the probate court. 1 abs. 135; 2 abs 517.

"Frantz"—Frantz Manufacturing Company an Illinois corporation.

"GSA"—The General Services Administration

The GSA was a federal governmental agency established by the Federal Property and Administrative Services Act of 1949 (63 *Stat* 377; *U.S. Code Cong Service* 1949 p 372) and as of July 1, 1949 took over the functions, records, property, personnel, obligations and commitments of the WAA.

"Gould"—W. E. Gould

Gould, now deceased, was one of the defendants prior to his death December 21, 1958.

"Mrs. Gould"—Harriet B. Gould

Mrs. Gould is widow of Gould and executor of his will, and since January 13, 1959, as such executor, has been one of the defendants.

"Grant"—William H. Grant.

Grant is a son-in-law of Gould, deceased, and since Gould's death December 21, 1958 has been an active official of defendant, loan company, and has been active in these proceedings on behalf of defendants. 2 abs 488.

"Harkrider"—Raymond Harkrider

Attorney Harkrider since prior to November 16, 1960 has been attorney for Lahman and has been in charge of these proceedings. 2 abs 495.

"Hensel"—Glen T. Hensel

Hensel was a real estate broker who conducted business in Joliet, Illinois, under the name of Glen T. Hensel Agency. R. S. Kelley was associated with Hensel. Hensel and Kelley performed services as brokers in the sale of the Rockdale properties by WAA to Lahman and Brubaker and later were retained by Lahman to procure tenants for these properties. 4 abs 38.

"Holley"—Robert E. Holley

Holley was a real estate broker who had office in The First National Bank building, Chicago. He was retained by Lahman to help procure tenants for the Rockdale properties. 4 abs 38, 39.

"Hornoff"—Albin T. Hornoff

Hornoff testified in these proceedings for defendants as to May 29, 1950 fair cash market value of the Rockdale properties.

"Interlake"—Interlake Industries Corporation an Illinois corporation.

"Mrs. Kolkey"—Florence E. Kolkey

Mrs. Kolkey worked in the loan company's office since March of 1945. For about five years she worked part time and took care of receipts that came in. Thereafter she worked full time as a bookkeeper and did typing and performed other miscellaneous duties in the office. 4 abs 318, 319.

"Kutner"—Luis Kutner.

Attorney Kutner represented Lahman in these proceedings until about the middle of 1960 when Lahman retained attorney Harkrider who since prior to November 16, 1960 has been in charge of these proceedings on behalf of Lahman. 2 abs 495.

"Lahman"—John Harold Lahman and, wherever applicable, Mildred R. Lahman.

John Harold Lahman, now deceased, was plaintiff-petitioner-appellant until his death February 9, 1967. Mildred R. Lahman is widow of John Harold Lahman and administrator of his estate and by order of appellate court entered May 16, 1967 was substituted herein as plaintiff-petitioner-appellant in lieu of John Harold Lahman.

"Lahman Inc."—J. H. Lahman Inc. a purported Illinois corporation.

"loan company"—W. E. Gould and Company, an Illinois corporation, one of the defendants.

"Martin"—Herbert O. Martin

For several years prior to June 21, 1949 Martin was plant superintendent of the Rockdale properties while owned and occupied by the U.S. He was very familiar with the properties. He was retained as general superintendent by Lahman from June 21, 1949 to May 29, 1950 while Lahman or Interlake operated the Rockdale properties. He was also retained by Gould as general superintendent of the Rockdale properties after May 29, 1950 and until he died in the fall of 1956. 4 abs 32, 54, 206, 302.

"master"—Philip H. Mitchel the master in chancery to whom this case was referred.

"NSF"—not sufficient funds

Some of the checks which Lahman gave the loan company in the 107 exchange check transactions were returned to the loan company by the drawee banks because Lahman did not have sufficient funds with the drawee banks to

honor such checks. These dishonored checks are identified by the letters NSF.

"Rockdale properties"—Three parcels of land containing approximately 26.54 acres located in section 20, township 35 north, range 10 east of the third principal meridian, in Will county, Illinois, described in sales agreement dated April 10, 1950 between the U.S. and Interlake—dx 21—and the buildings and improvements thereon or appurtenant thereto at the time in question.

The Rockdale properties are located in Rockdale, Illinois, which adjoins Joliet Illinois, on the southwest. The properties are about two miles southwest of the downtown district of Joliet and about 38 miles southwest of Chicago. px 114; 1 abs 178.

"Ronin"—Harold F. Ronin

Ronin was an attorney who practiced law in Chicago, Illinois. He was assistant secretary and registered agent of Interlake from November 9, 1949 to June 1, 1950; he was a director and vice-president of Interlake from April 3, 1950 to June 1, 1950; and he acted as general counsel for Interlake from August 1949 to May 29, 1950. dx 6; 1 abs 218, 219; 4 abs 624.

After May 29, 1950 Ronin asserted various claims against Interlake, including an action for attorney's fees in the amount of $26,700 entitled *Ronin* v. *Interlake* no. 52 S 9540. 4 abs 624.

"Sawyier"—Calvin P. Sawyier

Attorney Sawyier is a member of the Winston firm and since August 1, 1962 has been actively representing defendants in these proceedings. 2 abs 488.

"Snyder"—Eva Snyder

Snyder was a real estate broker who conducted business in Joliet. She performed services as broker in the sale of the Rockdale properties by WAA to Lahman and Brubaker. 4 abs 155.

"U.S."—The United States of America

"WAA"—The War Assets Administration

The WAA was a federal governmental agency originally provided for by executive order no. 9689 of January 31, 1946 (11 *F.R.* 1265; *U.S. Code Cong. Service* 1944 p 764) as amended had general supervision and direction, as provided in the Act, over the care and handling and disposition of surplus property.

"Winstin"—Mural J. Winstin

Attorney Winstin has appeared herein as attorney for the master. 2 abs 498.

"Winston firm"—Winston, Strawn, Smith & Patterson

The Winston firm on August 1, 1962 became attorneys herein for defendants in lieu of Abraham and Dordek. 1 abs 135.

APPELLATE COURT OPINION OF APRIL 18, 1967

This is an appeal from a decree of the Circuit Court of Cook County which dismissed the plaintiff's complaint, awarded the sum of $34,086.00 to the defendants and assessed the sum of $40,956.70 in master's fees equally between the two parties. Plaintiff raises four issues on this appeal: (1) that the chancellor erred in refusing to allow him to file his amended and supplemental complaint; (2) in denying his petition to suppress the master's report; (3) in issuing a decree which dismissed the plaintiff's amended complaint for want of equity and which entered judgment against the plaintiff in the sum of $34,086.00 and assessed costs equally between the parties; and (4) in allowing master's fees in the sum of $40,956.70.

The evidence in this case shows that the plaintiff, John Harold Lahman, was engaged in making profits out of speculative business ventures, and that the defendant, the now-deceased W. E. Gould and his company, W. E. Gould and Company were engaged in the making and brokering of loans to high-risk business ventures such as the plaintiff dealt in. Beginning in 1945, Lahman commenced borrowing money at high interest rates (commissions charged by Gould averaged around 20% per loan) from defendant, W. E. Gould and Company. On many of these ventures Lahman was making such profit that the high interest rates were a minor factor.

In February 1949, Lahman and one of his associates, Henry J. Brubaker, accepted a letter of intent to purchase a Navy Small Parts Plant at Rockdale, Illinois, from the War Assets Administrator, at a price of $875,000.00. The property consisted of approximately 26 acres, improved with buildings, containing about 700,000 square feet of space, which the plaintiff planned to lease for industrial use. In April 1949, plaintiff and Brubaker formed an Illinois corporation, Interlake Industries Corporation, hereinafter referred to as "Interlake," for the purpose of taking title to and possession of the property. Shortly after the formation of the corporation, Brubaker, because of illness, assigned to Lahman all of his right, title and interest in the letter of intent.

After June 1949, Gould and Company commenced to make substantial loans to Interlake, for which it received notes of Interlake. Interlake also picked up outstanding Lahman notes held by Gould and Company by the substitution of Interlake notes, thus in effect borrowing money on the very asset he was buying.

In 1950, Lahman and Interlake were in serious financial distress due to unfavorable economic conditions and, according to Lahman, a severe winter. Gould and Company held Lahman and Interlake notes and some Lahman "NSF" checks. It became apparent that the only way in which Lahman could salvage anything was to find a purchaser of the stock of Interlake or of all of its assets. Attempts were made to find a buyer. On March 27, 1950 the property was offered to H. A. Karsten for $1,150,000.00, which offer was not accepted, and in May the stock was offered to Arnold Hartman for $1,000,000.00, out of which sum Lahman was to pay $100,000.00 of notes payable. This offer also was not accepted. On May 29, 1950, Lahman and defendant W. E. Gould entered into a contract on behalf of Gould's company whereby Lahman completely parted with his interest in Interlake for a price of $960,000.00. The master found that this agreement

"was an arms length business deal between two competent businessmen, each seeking to salvage as much as they could in the face of the prospect of a default on a land purchase contract" which indeed it was.

Subsequent to the sale of the Interlake stock on May 29, 1950 the defendants refused to lend Lahman any more money. They suggested that Lahman organize a corporation, J. H. Lahman, Inc., which he did. The apparent purpose for organizing this corporation was to avoid the effect of the usury law. Lahman had pledged 55.2 shares of Frantz Manufacturing Company stock with the First National Bank of Chicago as security for a loan of $21,000.00. The Frantz stock had been the basis of Lahman's financial power; the company was a family-owned manufacturing company in which Lahman was not only a substantial stockholder but was also an officer drawing a salary of $40,000.00 per year. In July 1950, Lahman borrowed $21,000.00 through J. H. Lahman, Inc. from the defendants to pay off the First National Bank loan. Lahman, Inc. was charged a commission of $5,000.00 on this transaction by the defendants who took as collateral security the 55.2 shares of Frantz that had been held by the First National Bank. In November of the same year Lahman faced a substantially similar problem involving a loan from the National Bank of Sterling, where he had pledged 55 shares of the Frantz stock as security for a loan of $22,000.00. Once again the defendants loaned him money and took as security the Frantz stock and charged a commission of $4,400.00. Lahman, through his company, J. H. Lahman, Inc., continued to borrow money from the defendants, not from any coercion by the defendants, but as a result of Lahman's indebtedness to persons other than the defendants.

Shortly prior to June 26, 1951, Lahman approached Gould for a loan of $15,000.00 to $20,000.00 and was turned down by Gould who said he could not loan any more

money "because your collateral is used up." On June 26, 1951 the parties signed an agreement which recited that Lahman in consideration of the cancellation of the notes totaling $104,000.00 and the payment to him of $15,000.00 in cash, sold his 117.2 shares of Frantz stock to Gould. As he did in connection with the sale of the Interlake stock, Lahman claimed that the sale was not an absolute sale, but was merely a new collateral agreement to secure loans already made with Gould and Company. By the very terms of the agreement which Lahman signed on June 26, 1951, however, it is conceded that the transaction was a sale of the Frantz stock, "This stock is definitely and absolutely sold to us as of this day. Should we desire to sell this stock we will first offer it to you."

As we have already noted, plaintiff raises four issues on this appeal, the first of which is that the trial court erred in denying plaintiff Lahman leave to file an amended and supplemental complaint in excess of eighty pages, following the filing of the master's report. In denying the petition the trial court found: (1) The sufficiency of the evidence contained in the master's report, the transcript and supporting documentary matter, is not challenged by any of the parties to these proceedings as not representing all the evidence respectively offered in support of the merits or substantive issues involved; (2) the proferred complaint was not of sufficient substance or relevance to reopen the hearings on the merits or to have the cause to be reheard on the merits; and (3) the filing of the motion by the plaintiff after the master's report had been filed (some nine years after the filing of the original complaint) came too late to allow the filing of the amended and supplemental complaint.

It is clearly the law in this state that the granting or denying of an amendment to the pleadings is a matter for the discretion of the trial court whose ruling will not be disturbed on review, absent a clear showing of abuse of

that discretion. *Deasey* v. *City of Chicago,* 412 Ill. 151, 105 N.E. 2d 727; *Old Salem Chautauqua Association* v. *Assembly of God,* 13 Ill. 2d 258, 148 N.E. 2d 777; *Hall* v. *Gerdes,* 68 Ill. App. 2d 119, 215 N.E. 2d 8. The test to be applied in determining whether the exercise of discretion with respect to the allowance of an amendment of the pleadings was proper, is whether it furthers the ends of justice. *Bowman* v. *County of Lake,* 29 Ill. 2d 268, 193 N.E. 2d 833.

Plaintiff's rationale in filing the amended and supplemental complaint is that he was distraught and in financial straits and did not have accurate or adequate information, with the result that his original and amended complaints contained some "improvident, inaccurate or inept allegations"; that over a three and one-half year period the defendants stated and represented that this cause should be decided on the basis of the "extended evidence, both oral and documentary" which "was offered before the master"; but that notwithstanding the above, the master devoted thirty pages of his report to an analysis of the pleadings. This procedure the plaintiff claims was extremely inequitable and unfair because an extended analysis of the pleadings was unnecessary and because the incorrect allegations on which the master relied were corrected or superseded by accurate statements in the statements of facts and other documents filed by the plaintiff with the master.

It was manifestly not an abuse of discretion for the trial court to have denied plaintiff's petition to file his amended and supplemental complaint. This complaint came very late in the day of an already expensive and lengthy proceeding, during which time plaintiff had already had two opportunities to assert his claims. We see no abuse of discretion in denying him a third attempt. Moreover, on the basis of plaintiff's allegations it would be necessary for this court to find both that an analysis of the pleadings was crucial to the validity of the master's report and that, that analysis was faulty because of the alleged inaccura-

cies in the original and amended complaint. It is not apparent, either from the plaintiff's brief or from the record or from a reading of the master's report, that the master's analysis of the pleadings included therein, was critical to the sufficiency of that report. As pointed out by the trial court, no attack was made on the sufficiency of the evidence contained in the report. Moreover, if there were inadequacies in the original and amended complaints, there is no showing of what these inadequacies are or in what way the amended and supplemental complaint would cure these defects. In short, we are of the opinion that the amended and supplemental complaint was of little substance or relevance.

Plaintiff next contends that the trial court should have granted his petition to suppress the master's report and for certain other relief.

Plaintiff cites three items in support of his allegation that the master's report is biased in favor of the defendant and should have been suppressed: (1) the master ignored the testimony that the value of the Interlake stock, whose sole asset was the Rockdale property, as of May 29, 1950 was $1,541,920.00; (2) the master ignored testimony that the value of the 117.2 shares in Frantz was $1500.00 per share on June 26, 1951; and (3) the master assumed, without evidence, that the Korean War which began in June 1950, influenced the value of the Rockdale property and consequently post-Korean War values were irrelevant as to the Pre-Korean War values.

As already noted, Lahman and one of his associates, Henry J. Brubaker, bought the Rockdale property from the War Assets Administration for the sum of $875,000.00, and took title on behalf of Interlake. When the plaintiff ran into financial difficulties in this venture attempts were made to dispose of the Interlake stock before the eventual sale to Gould. On March 27, 1950, the stock was offered to H. A. Karsten for $1,150,000.00 which offer was not ac-

cepted. In May 1950, the stock again was offered for sale to Arnold Hartman for $1,000,000.00 out of which sum Lahman was to pay $100,000.00 in notes payable, for a total selling price of $900,000.00. This offer was also not accepted. There was also testimony by one of defendants' expert witnesses that the value of Interlake's Rockdale property was $885,000.00 on the date of the sale to Gould. In view of considerable evidence that the Interlake stock was worth not more than $1,000,000.00, it cannot be said that the failure of the master to cite the considerably larger figure offered by plaintiff's expert witness is indicative of any prejudice on the part of the master.

Plaintiff's allegation in regard to the Frantz stock is likewise lacking in substance. Lahman, himself, testified that the highest price ever paid for Frantz stock was $600.00 per share. Plaintiff also testified that the stock had a book value of $1,000.00 per share in 1949, and that it was increasing in value by approximately $100.00 per year. Gould paid nearly $1,000.00 per share when he bought the stock in 1951. The master's failure to include the estimate of plaintiff's witness who was also a personal friend and officer in Frantz does not support an inference of prejudice.

Plaintiff's third claim of prejudice, that the master prejudiced the plaintiff by taking into account the economic effects of the Korean War is similarly lacking in merit. As a matter of law, it is clear that our courts will take judicial notice, and will not require proof, of periods of inflation and deflation. *Cent. Ill. Public Service* v. *Thompson,* 1 Ill. 2d 468, 115 N.E. 2d 888; *People ex rel Schmulbach* v. *City of St. Louis, Mo.* 408 Ill. 491, 97 N.E. 2d 252.

In view of the utter paucity of the evidence on the issue of the prejudice of the master, and, the overall fairness of his report, we hold that the trial court was not in error when it denied the plaintiff's motion to suppress.

Lahman's next contention is that he is entitled to recover the Interlake stock and the shares in Frantz by way of redemption, restitution or constructive trust. The gist of the plaintiff's argument is that, (1) there was no sale, but (2) if there was a sale, he has a right of redemption because of the existence of a fiduciary relationship or because of the existence of an oral understanding, (3) or the sale is void because the sale price was unconscionable.

Plaintiff, in effect, is asking this court to substitute our judgment in place of the findings of the master and of the trial court. That is something that this court should not do unless the findings of the master are manifestly against the weight of the evidence. *Rose* v. *Dolejs*, 1 Ill. 2d 280, 116 N.E. 2d 402; *Punzak v. Delano*, 11 Ill. 2d 117, 142 N.E. 2d 64; *Gallagher* v. *Girote*, 23 Ill. 2d 170, 177 N.E. 2d 103.

The evidence establishes that the transactions of May 29, 1950 and of June 26, 1951 were unconditional sales of Interlake and Frantz stock. In a supplementary letter to the May 29, 1950 agreement, it is stated that:

> "These notes (held by Gould and Company) are considered as part payment on the purchase price of all the outstanding and issued shares both common and preferred of Interlake Industries Corporation as more fully described in a purchase contract dated May 29, 1950."

In the letter embodying the June 26, 1951 agreement it is stated:

> "This stock is definitely and absolutely sold to us as of this day. Should we desire to sell this stock we will first offer it to you."

Moreover, there is testimony (later recanted) that Lahman treated the May 29, 1950 and June 26, 1951 transactions as sales for federal income tax purposes. As we noted earlier, attempts to sell the Interlake property had been made before the sale to Gould. Finally, plaintiff's claim that the agreements were modified oral agreements made at the time the written agreements were made is

not credible. The only evidence that there was such an agreement is plaintiff's own testimony, which is contradicted by the fact that plaintiff had previously testified under oath on different occasions. (Brubaker v. Gould, 34 Ill. App. 2d 421, 180 N.E. 2d 873.) that the transactions were outright sales.

We have already considered the value of the Interlake stock and the shares in Frantz. In view of that finding we cannot say that the defendants paid an unfair price for the stock.

Plaintiff also contends that a confidential relationship existed between him and the defendants, that the defendants violated the confidential relationship for which reason the Interlake and Frantz transactions should be voided. Equity will raise a trust by construction where there is a fiduciary or confidential relationship and a subsequent abuse of the relation and where actual fraud makes it necessary to protect the rights of the defrauded party and promote the interests of society. *Kapraun* v. *Kapraun*, 12 Ill. 2d 348, 146 N.E. 2d 7; *Carroll* v. *Caldwell*, 12 Ill. 2d 487, 147 N.E. 2d 69; *Kochorimbus* v. *Maggos*, 323 Ill. 510, 154 N.E. 235. Plaintiff in this case has produced no evidence of any specific acts which would lead this court to believe that a relationship other than debtor and creditor existed. Where such a relation does not exist as a matter of law and is sought to be established by parol evidence, the proof must be clear and convincing, and so strong as to lead to but one conclusion. *Mortell* v. *Beckman*, 16 Ill. 2d 209, 157 N.E. 2d 63; *Lux* v. *Lelija*, 14 Ill. 2d 540, 152 N.E. 2d 853; *Lawrence* v. *Muter*, 171, F. 2d 380. That is not the case in this situation.

Plaintiff's last point on this appeal is that the master's fees should be reduced or disallowed and that the master's report should be reduced or disallowed and that the master's report should be suppressed because of irregularities in making of deposits with the master.

Beginning on June 7, 1961, about six years after this cause of action was referred to the master, a series of four payments of $5,000.00 each was deposited with the master without the knowledge or order of the court. Defendants contend that the payments were made pursuant to an agreement between the parties whereby the defendants agreed to guarantee the master's fees and to make deposits on demand of the master. The evidence on the existence of this oral agreement is conflicting.

Whether the alleged agreement actually existed or not, the plaintiff is quite correct in his assertion that the payments to the master violated both Chap. 53, Sec. 38, Ill. Rev. Stat. 1963, and Rule 9.3, Rules of the Circuit Court, which are as follows: Chap. 53, Sec. 38, Supra.

> ". . . Upon reference of any matter to the master in chancery the court may, in its discretion, at the time of such reference or at any subsequent time, order any party seeking to offer evidence before the master to deposit with the clerk of the court such sum or sums as may be fixed by the court to secure the payment of any part or all of the costs of such reference; . . ."

Rule 9.3 (a), Supra.

> "DEPOSITS AND STIPULATIONS. Before the disposition of all objections to his report, the master shall not request or accept from a party or attorney any stipulation as to the amount of the master's fees. Before the taxation of his fees, the master shall not request or receive any deposit or payment for his services upon the reference except
>
> (i) upon approval by the court; or
>
> (ii) for accrued fees for the taking and reporting of testimony at the statutory rate and for taxable stenographer's fees."

Rule 9.3(d) Ibid., further provides that:

> "The court in its *discretion* (emphasis added) may disallow master's fees in whole or in part in respect to any improper proceedings occasioned by the fault of the master."

From a reading of the above provisions it is clear that they do not provide for the suppression of the report because of irregularities in the making of payments to the master. The most that could have been done under the circumstances and provisions of the rules of the Circuit Court was the taking away of all fees earned by the master and that was a remedy available to the court in all cases. The remedy of suppression is not given. There was not the slightest evidence of any prejudice to the plaintiff which would warrant the fixing of the fees by anyone other than the court which heard the matter, and no prejudice in the receipt of any deposits in advance of the court's fixing of the fees.

The chancellor found:

"1. That the court has jurisdiction of the parties hereto and the subject matter hereof, and that said decree should contain the following findings:

(a) That said master's report contains a proper and accurate summation of the facts; and, the master's analysis of the facts therein and his application of the law thereto reflects a high degree of competency in conducting the hearings before him as well as a full comprehension of the issues involved.

(b) The findings of fact, the conclusions of law and the recommendations contained in said master's report represent a fair and reasonable result derived from the hearings before him, as revealed from the transcript of such proceedings.

(c) Said master's report should be approved by this Court.

(d) The Certificate of Fees and Charges of the master attached to his report, which was submitted for the consideration of this court, without objection thereto, should be approved and his said fees and charges should be assessed and charged as costs of these proceedings.

(e) The defendants, as a unit, voluntarily deposited with the master, during the course of the hearings, the sum of $20,000.00 as an assurance for payment to the master their share of his fees and charges and,

with the additional consideration that certain equities on the question of dividends were found by the master in favor of the plaintiff, it is reasonable to assess the costs of the proceedings equally against the plaintiff and the defendant W. E. GOULD & COMPANY. It is the opinion of the court that the deposit for master's fees made by the defendants in no way influenced the judgment or opinion of the master, as the master's report, in no respect, indicates a prejudiced determination of the facts, based upon the evidence submitted."

This was a clear expression of opinion by the chancellor who dealt with this case and knew more about it than any other person, and should be controlling in the fixing of the master's fees. Hereinbefore we found that the report of the master was fair and accurate.

The only remedy provided by the statute is for a reduction or disallowance of the master's fees. It is clear that the making of the payments had no effect on the fairness of the report. While we do not approve of or condone the practice of making deposits with the master without the knowledge or approval of the court, we feel that the exercise of discretion by the chancellor should not be disturbed absent any showing of wrongdoing on the part of the master or the defendants.

Plaintiff also claims that the trial court erred in approving the $40,956.70 master's fee. The basis of the plaintiff's complaint on this point is that the master's report failed to contain a request for an order taxing fees as required by rule 9.2 of the Circuit Court. While the plaintiff filed a petition to suppress the master's report he at no time attacked the amount of the fees or the manner of certification, nor did he make any objection to the trial court on this matter. Plaintiff's failure to preserve as an issue the propriety of the master's fees precludes our consideration thereof. *Mitchell* v. *Art Institute of Chicago*, 269 Ill. 381, 109 N.E. 1008.

For the above reasons the decree is affirmed.

APPELLATE COURT JUDGMENT OF APRIL 18, 1967

The decree of the Circuit Court of Cook County is AFFIRMED.

It is further ordered by the Court that the said W. E. Gould Company and Harriet B. Gould, Executor of the Will of W. E. Gould, Certain Appellees, recover costs from Appellant.

It is further ordered by the Court that the said Philip H. Mitchel, Certain Appellee, recover costs from Appellant.

Execution may issue.

ILLINOIS SUPREME COURT ORDER OF SEPTEMBER 26, 1967

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioner costs by them in this behalf expended, to be taxed in due course of administration.

ILLINOIS SUPREME COURT ORDER OF NOVEMBER 21, 1967

And now, on this day, the Court having duly considered the motion by petitioner for reconsideration of order denying petition for leave to appeal and that petition be treated as a petition for leave to appeal as of right, and being now fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by petitioner for reconsideration of order denying petition for leave to appeal and that petition be treated as a petition for leave to appeal as of right be, and the same is, denied.

First informal 1-page letter dated May 29, 1950
(px 46; dx 3)

Mr. W. E. Gould
W. E. Gould and Company
39 South La Salle St.
Chicago, Ill.

Chicago, Illinois
May 29, 1950

Dear Mr. Gould:

Pursuant to our recent conversation the undersigned, president of Interlake Industries Corporation and owner of seventy five percent (75%) of the outstanding capital stock of Interlake Industries Corporation, an Illinois corporation does hereby agree to deliver to you all of the outstanding capital stock of Interlake Industries Corporation consisting of Six Hundred and Fifty (650) shares of Preferred Stock of $100 par value per share and Ten Thousand shares of Common Stock of $1.00 par value per share, for a total consideration of Nine Hundred and Fifty Thousand Dollars ($950,000.00). The above mentioned stock is all the stock of Interlakes Industries Corporation issued and outstanding. The above is subject to the following terms and conditions:

1. J.H.Lahman and the stockholders of Interlake Industries Corporation agree to pay all outstanding debts and obligations due as of this date with the exception of Seven Hundred and Sixty Thousand Dollars ($760,000.00) due the United States Government on a purchase contract between War Assets Administration, J.H. Lahman and Interlake Industries Corporation.
2. The said W.E.Gould agrees to turn back to J.H.Lahman and/or Interlake Industries Corporation all notes and collateral of the said J.H.Lahman and/or Interlake Industries Corporation totalling One Hundred and Seventy Nine Thousand Dollars ($179,000.00) as they mature and to pay to J.H.Lahman the sum of Eleven Thousand Dollars ($11,000.00) in cash in the following manner:

   $2400.00 herewith the receipt of which is hereby acknowledged. $8600.00 balance to be paid $2600.00 on June 5, 1950 and $6000.00 on July 1, 1950.

The said W.E.Gould is to retain twenty five (25) shares of stock of Frantz Manufacturing Company until all Interlake Industries stock is turned over to him and outstanding bills against Interlake Industries Corporation are all paid and receipted.

Possession of the properties near Joliet, Illinois owned by Interlake Industries Corporation is to be given as of June 1, 1950, to W.E.Gould and Company.

INTERLAKE INDUSTRIES CORPORATION

by /s/ J. H. Lahman
President

/s/ J. H. Lahman
J. H. Lahman

Accepted:
W.E.GOULD AND COMPANY

by /s/ W. E. Gould
President

/s/ W. E. Gould
W.E.Gould

Received on 6/2/50 $1000 as part payment on $2600 JHL
Received on 6/6/50 $1600 in full payment of $2600 due 6/5/50 JHL
Received on 7/1/50 $5000 and credit of $1000 to apply on offset making a total credit of 6000 JHL
Received 10/15/52 $500 payment in full of sale contract JHL

Second informal 1-page letter dated May 29, 1950
(px 49; dx 4)

CEntral 6-2522

W. E. GOULD & CO.
Financing - Loans
Suite 1124 - 39 South La Salle Street
Chicago 3

Catholic Securities

Representing
B. C. Ziegler & Co.

May 29, 1950

Mr. J. H. Lahman and
Interlake Industries Corporation

Gentlemen:-

This letter will confirm the settlement reached today between yourself and W. E. Gould and Company wherein it has been agreed that all of the notes of J. H. Lahman personally, and J. H. Lahman and Interlake Industries Corporation totaling $179,000.00 due W. E. Gould and Company as of this day, shall be considered paid. These notes are considered as part payment on the purchase price of all of the outstanding and issued shares both common and preferred of Interlake Industries Corporation as more fully described in a purchase contract dated May 29, 1950.

Very truly yours,

W. E. GOULD AND COMPANY

By /s/ W. E. Gould
W. E. Gould

The above letter correctly sets
forth the terms of our settlement

/s/ J. H. Lahman
J. H. Lahman

Interlake Industries Corporation

By /s/ J. H. Lahman
J. H. Lahman, President

First informal 1-page letter dated June 26, 1951
(px 58)

CEntral 6-2522

W. E. GOULD & CO.
Financing - Loans
Suite 1124 - 39 South La Salle Street
Chicago 3

Catholic Securities — Representing B. C. Ziegler & Co.

June 26, 1951.

Mr. J. H. Lahman,
c/o Frantz Manufacturing Co.
Sterling, Ill.

Dear Mr. Lahman:

You were in our office today and in our conversation we agreed at your request that we would purchase your 117.2 shares of Frantz Manufacturing Company common stock which we now hold as collateral at the price of $1000 per share which amounts to $117,200.

Your notes which we hold amount to $104,100 so we will have to pay to you the difference or $13100. You have paid us advance commission for which we will rebate you $1900 so we will owe you $15,000 for this stock which is the agreed amount. We have paid you on this account $6500.00 in cash today so we still owe you $8500 which we will pay you on July 2, 1951.

This 117.2 shares of stock is to be transferred on the books of the corporation into the name of W.E.Gould and Company or their nominee on August 15,1951. We are to get the dividends on this stock on January 2, 1952.

This stock is definitely and absolutely sold to us as of this day. Should we desire to sell this stock we will first offer it to you.

Very truly yours,

W. E. Gould and Company

/s/ W. E. Gould

June 26, 1951.

This is acceptable to me.

J. H. Lahman,

By /s/ J. H. Lahman

June 26 1951 Paid 6500.00

June 30 1951 Paid 8500.00

Second informal 1-page letter dated June 26, 1951
(px 59)

CEntral 6-2522

W. E. GOULD & CO.
Financing - Loans
Suite 1124 - 39 South La Salle Street
Chicago 3

Catholic Securities

Representing
B. C. Ziegler & Co.

June 26, 1951

Mr. J. H. Lahman
c/o Frantz Mfg. Co.,
Sterling, Ill.

Dear Mr. Lahman:

You were in our office today and in our conversation, we agreed, at your request, that we would purchase your 117.2 shares of Frantz Manufacturing Company common stock which we now hold as collateral, for the sum of $110,000 and in addition thereto, we are to pay you $15,000 in cash after this transaction is completed. Your notes, which we hold and which we are cancelling, amount to $104,100.

We have paid you on this $15,000 item in cash today, $6500.00 and we are owing you $8500.00 which we will pay you on July 2, 1951. The difference, or $9100, we are deducting from your notes in order to clear this matter up, as rebate account of commissions.

This 117.2 shares of stock is to be transferred on the books of the corporation into the name of W. E. Gould and Company or their nominee on August 15, 1951. We are to get the dividends on this stock, October 2, 1952 and thereafter. This stock is definitely and absolutely sold to us as of this day. Should we ever desire to sell this stock, we will first offer it to you.

Very truly yours,

W. E. GOULD AND COMPANY

/s/ W. E. Gould

June 26, 1951.

This is acceptable to me.

J. H. Lahman,

By /s/ J. H. Lahman

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 6 1968
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1103

MILDRED R. LAHMAN, SURVIVING WIDOW AND ADMINISTRATOR OF ESTATE OF JOHN H. LAHMAN, DECEASED,

Appellant,

vs.

W. E. GOULD AND COMPANY, HARRIET B. GOULD, EXECUTOR OF WILL OF W. E. GOULD, DECEASED, AND PHILIP H. MITCHEL, MASTER IN CHANCERY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS ON BEHALF OF APPELLEES.

CALVIN P. SAWYIER,
38 South Dearborn Street,
Chicago, Illinois 60603,
Counsel for Appellees, W. E. Gould and Company and Harriet B. Gould, Executor of will of W. E. Gould, deceased.

WINSTON, STRAWN, SMITH & PATTERSON,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1103.

MILDRED R. LAHMAN, SURVIVING WIDOW AND ADMINISTRATOR OF ESTATE OF JOHN H. LAHMAN, DECEASED,

Appellant,

vs.

W. E. GOULD AND COMPANY, HARRIET B. GOULD, EXECUTOR OF WILL OF W. E. GOULD, DECEASED, AND PHILIP H. MITCHEL, MASTER IN CHANCERY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS ON BEHALF OF APPELLEES.

Appellees, W. E. Gould and Company and Harriet B. Gould, Executor of the Will of W. E. Gould, deceased, move that the Court dismiss this appeal or—treating the papers whereon this appeal is taken as a petition for a writ of certiorari—deny certiorari.

Appellant has recived an exhaustive hearing, extending over some ten years of trial court proceedings and three years of appellate proceedings, and entailing literally thousands of pages each of testimony, exhibits and argument. This appeal merely tries to obtain review of state court findings of fact which establish that the encyclopedic conglomeration of legal claims advanced by appellant, in-

cluding the claim that he did not receive a fair and impartial trial, have no support in this record and are totally without basis in fact. This Court is not a trier of facts and does not sit to review such questions.

Not only are the questions thus presented manifestly not substantial enough to justify this Court's exercise of jurisdiction, but this appeal is not within the jurisdiction of this Court because not in conformity with 28 U. S. C. § 1257(2). The courts below never were properly presented with, and have not passed upon, any federal question concerning the purely administrative Rule 9.3 of the Circuit Court of Cook County, Illinois, the local trial court, which is the "statute" purportedly involved here.

STATEMENT.

This case was filed in 1955, seeking to rescind two business transactions which had taken place some five years earlier between defendant—who was in the church mortgage and loan brokerage business—and plaintiff—who was a commercial developer and business speculator. The matter was referred generally to a master-in-chancery to receive proofs and make recommendations to the trial court. Proofs were not closed until 1959, by which time the defendant, W. E. Gould, who was nearly 90 years old at the time of the taking of evidence before the master, had died. Previously, a motion by defendants for dismissal at the close of plaintiff's evidence had been denied, there being documentary evidence and testimony wholly apart from plaintiff's testimony which had been introduced in support of plaintiff's case. (*Cf.* Jurisdictional Statement, 3-4.) The test applicable on such a motion under Illinois practice was whether "there is *any* substantial evidence tending [in the total absence of rebutting evidence] to prove plaintiff's allegations". *Peters* v. *Catt,* 15 Ill. 2d 255, 259, 154 N. E. 2d 280, 283-4 (1958); *Fewkes* v. *Borah,* 376 Ill. 596, 600, 35

N. E. 2d 69, 72 (1941); *City of West Frankfort* v. *Fullop*, 6 Ill. 2d 609, 617, 129 N. E. 2d 682, 687 (1955).

In November, 1960, plaintiff's present counsel entered his appearance, sought and obtained a reopening of proofs and commenced to file voluminous pleadings and briefs. The master issued his report in July of 1963, received and ruled on objections thereto, and filed the master's report in December, 1963.

The trial court, in considering the exceptions to the master's report, heard extended oral argument on the merits of the case on February 4 and 5, 1964, and appellant also submitted over 2,000 pages of argument, statement of facts, abstract of testimony, data and schedules summarizing evidence, and suggestions for decree.

In March, 1964, appellant filed a petition to suppress the master's report and for other relief, asking that the trial court deny the master fees and proceed to consider the case on the transcript and exhibits and make its own findings and conclusions. The master was made a respondent to this petition and appellant has ever since included the master's name as a party to the various appeals herein. The Chancellor set said petition down for hearing in April, 1964, and heard the testimony of witnesses, including plaintiff, and then, in May, heard further oral argument in the case and thereupon took all the pending matters under advisement. The trial court took until February 17, 1965, to decide the case.

Appellant's petition to suppress had alleged that the deposits made by defendants against accrued master's fees were made "without the knowledge, consent or approval, express or implied" of plaintiff or his attorneys. (2 Abst. 480.) The trial court, hearing the testimony on the petition and deciding the matter in the first instance and with a fairness and impartiality which even appellant has not

sought to impugn, found that (2 Abs. 583; *Cf.* Jurisdictional Statement, p. 7):

> "the said plaintiff's motion to suppress the master's report and the petition upon which it is based are not supported by the greater weight of the evidence adduced at the hearing," and "the evidence clearly establishes that the charges as set forth in plaintiff's petition to suppress the master's report is without merit."

The attorney who had represented the defendants prior to August, 1962, testified that he had—so that plaintiff, who did not have the funds to make any deposit, would not be curtailed in any manner in presenting his case—agreed with plaintiff and plaintiff's then attorney not to go before the trial court for an order requiring deposits from plaintiff over the course of the lengthy master's hearings, but that at the same time defendants could make such deposits as the master might require as security for fees earned. This latter part of the agreement was important for the reciprocal protection of the defendants in the situation thus presented under the master-in-chancery system where, as here, there is an impecunious plaintiff and a financially responsible defendant. A master may naturally be thought to be concerned as to how he will collect his fees for a large case unless he decides for the plaintiff, and the only fair way to permit the plaintiff to proceed without cost is an arrangement, such as was made, to guarantee that the master will receive some fees, however he may decide the case. The master corroborated the above testimony of defendants' then counsel; but payments made pursuant to this arrangement—which were only called for by the master after plaintiff had, after several years, reopened the record and added massively to the master's already enormous task—plaintiff now chooses to call "secret", in a rather reckless and misdirected effort somehow to upset the independent factual

decisions against him of the trial court and of the appellate court below.

The trial court had this case under consideration for many months. In deciding the matter the trial court made several independent findings and conclusions from its own direct examination of the record. These independent findings were distinct from those made by the master, which plaintiff sought to impugn, and were extensive and comprehensive enough in themselves fully to support the trial court's decree. (2 Abst. 584-5.) (*Cf.* Jurisdictional Statement, p. 9.)

On appeal the Appellate Court, whose review and statement of the case demonstrates a real familiarity with this record, thoroughly canvassed and confirmed the findings and determinations of the trial court, including the clear lack of credibility of plaintiff's testimony. (226 N. E. 2d 443, 448-9; Appendix to Jurisdictional Statement, pp. 12-13.)

The case was then thrice presented to the Illinois Supreme Court, first by petition for leave to appeal, then by motion for reconsideration of the petition for leave to appeal and to treat said petition as an appeal as of right (on the purported ground that a constitutional question arose for the first time as the result of the action of the Appellate Court), and finally by motions (in which appellant joined) for reconsideration of petition for leave to appeal and to be made parties to these proceedings filed by certain general creditors of the appellant whose claims arose from loan transactions with appellant entirely unrelated to any transactions between appellant and appellees. The Illinois Supreme Court decided each of these petitions against appellant without rendering any opinion, and the present appeal to this Court followed.

ARGUMENT.

I.

JURISDICTION IS LACKING HERE.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(2) governing appeals from final judgments of state courts where the validity of a state statute is upheld as against argument that it is repugnant to Federal law.

Jurisdiction fails at the threshold.

A. Appellant's Present Claim That a Substantial Federal Question Is Presented Contradicts the Procedure He Elected to Follow Below.

That appellant presented no federal constitutional question of any substance concerning the validity or construction of any state statute is clear from the procedure which appellant himself elected to follow in the state court system. By appealing to the Appellate Court of Illinois, rather than directly to the Supreme Court of Illinois, appellant conceded that no substantial question "arising under the Constitution of the United States or of this State" was involved (*Constitution of Illinois,* Article VI, Section 5, 2nd paragraph), although appellant had cited to the trial court Rule 9.3 of the Circuit Court of Cook County and claimed to have been deprived of a fair hearing contrary to due process of law. (2 Abst. 481, 483, 556-7, 565.)

Under Illinois law the Appellate Court has no jurisdiction of other than routine constitutional questions which are so well-settled as not to be fairly debatable and whose resolution depends on the facts of the particular case and

is of interest primarily to the immediate parties. *Pettigrew* v. *National Accounts System*, 67 Ill. App. 2d 344, 346, 213 N. E. 2d 778, 779-80 (App. Ct., 1966); *People* v. *Valentine*, 60 Ill. App. 2d 339, 344-8, 208 N. E. 2d 595, 598-600 (App. Ct., 1965).

Had a substantial constitutional question been involved —as appellant now urges—appeal would have been taken directly to the Illinois Supreme Court; or had any substantial constitutional question been made to appear in the course of the appeal to the Illinois Appellate Court, that court would have transferred the case immediately to the Illinois Supreme Court. *Constitution of Illinois*, Article VI, Section 5, 2nd paragraph; *Illinois Revised Statutes*, Ch. 110, §§ 86 and Ch. 110A, §§ 302, 365 (formerly Ch. 110, §§ 101.28-1).

The Illinois Supreme Court has clearly and expressly held that the standard of a "substantial" constitutional question under the above Illinois appellate practice is the same as that applied by the Supreme Court of the United States in determining whether the substantial federal question requisite to its exercising jurisdiction either on appeal or certiorari from state decisions is present. *First National Bank & Trust Co.* v. *Evanston*, 30 Ill. 2d 479, 482-3, 486, 197 N. E. 2d 707, 709 (1964).

Therefore, the state procedure elected by appellant is determinative against this Court's consideration of this case, either as an appeal or treated as a petition for certiorari, by reason of the recognized lack of a substantial constitutional question in the proceedings below. (*Rules of The Supreme Court of the United States*, Rule 16-1(b), Rule 19-1(a).)

B. The Purported Issue of the Validity of a Local Trial Court Administrative Rule Was Not Timely or Properly Raised or Passed on Below.

The State judicial rule-making power in respect to all general matters of pleading, practice and procedure is vested in the Illinois Supreme Court. *Constitution of Illinois,* Article VI, Section 2. Subject to this rule-making and administrative authority of the Illinois Supreme Court, the local trial courts (Circuit Courts) "may make rules regulating their dockets, calendars and business." *Illinois Revised Statutes,* Chapter 110, § 2. Whether local administrative court rules, like Rule 9.3 of the Circuit Court of Cook County asserted here, have the "legislative character" which is decisive of the meaning of the word "statute" in 28 U. S. C. § 1257(2) is, perhaps, doubtful. Cf. *Lathrop* v. *Donohue,* 367 U. S. 820, 824-5 (1961). But, in any event, it is clear that the failure of appellant below to place in issue the constitutional validity of this Rule is decisive against his purported appeal under the requirements of § 1257(2) that (a) the validity of this "statute" have been questioned below on federal constitutional grounds, and (b) the court below have passed on this question by upholding the validity of this "statute."

Out of 120 pages of trial court brief in support of the petition to suppress the master's report, out of 200 printed pages of Appellate Court briefs arguing this case, and out of 24 closely-typed pages of petition for rehearing before the Appellate Court, there is not one word by appellant claiming that Rule 9.3 might be invalid. [Indeed, there are only two sentences out of this mass of argumentative material which even mention the due process clause of the Federal Constitution, and then only in connection with the general claim of the guarantee of a hearing before a fair and impartial tribunal.] (2 Abst. 518-581, 565; Brief (p.

75) and Reply Brief for Appellant in Illinois Appellate Court; Petition for Rehearing in Illinois Appellate Court; *See* Jurisdictional Statement, pp. 22-23.) Under Illinois procedure, constitutional challenges must be made from the trial court stage and they must specify in what particular respect the statute violates some constitutional limitation. *Biggs* v. *Cummins,* 5 Ill. 2d 512, 516, 126 N. E. 2d 208, 210 (1955).

The Rules of court governing briefs in the Illinois Supreme Court and in the Illinois Appellate Court require that, "in a case involving the construction or validity of a statute", the pertinent parts of the statutory provision in question be set forth verbatim in a separate heading (such as, "Statutes Involved") at the beginning of the brief. *Illinois Revised Statutes,* Chapter 110A § 341(e)(6) (formerly Ch. 110, § 101.39(1), 3rd paragraph and § 201.7, 3rd paragraph). That Rule 9.3 of the Circuit Court of Cook County was not deemed to be so involved is shown by the fact that no such procedure was followed by appellant in presenting his briefs below.

Thus, the failure to argue the validity of Rule 9.3 at all, and, indeed, the failure to argue the more general question of lack of a fair hearing under Federal due process except in one sentence out of 200 pages of appellate brief, constitutes a failure adequately to preserve these questions for review, both under the Illinois procedure and the practice of this Court. *Beck* v. *Washington,* 369 U. S. 541, 553 (1961).

The judgment reviewed here is that of the Illinois Appellate Court, since review thereof by the Illinois Supreme Court was discretionary and that higher court declined to exercise its authority. *Illinois Revised Statutes,* Chapter 110A, § 315 (formerly Ch. 110, § 101.32); *American Ry. Exp. Co.* v. *Levee,* 263 U. S. 19, 20-21 (1923). Hence, the

failure to raise the constitutionality of Rule 9.3 before the Appellate Court, even upon petition for rehearing, the failure of the Appellate Court to pass on the validity of Rule 9.3, and the failure of the Illinois Supreme Court to entertain the petition for leave to appeal preclude review by appeal under 28 U. S. C. § 1257(2) here. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945); *Mallett* v. *North Carolina,* 181 U. S. 589, 592 (1901); *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128 (1945); *Forbes* v. *State Council of Virginia,* 216 U. S. 396 (1910); *Stembridge* v. *Georgia,* 343 U. S. 541, 547 (1952).

C. Even as Posed in Untimely Fashion Upon Petition for Discretionary Review by the State Supreme Court, the Issues Relating to Circuit Court Rule 9.3 Rest on an Adequate Non-Federal Basis.

A glance at the opinion of the Illinois Appellate Court under review here will show that it properly treated the issues raised by appellant's trial court motion to suppress the master's report (which also moved to deny fees to the master—2 Abst. 483) under two separate headings: (1) the Appellate Court first decided whether any prejudice or unfairness on the part of the master had been shown, either in his acceptance of deposits or otherwise, and (2) then the Appellate Court construed Rule 9.3 to determine whether that Rule was intended, in addition to governing the administration and allowance of masters' fees, to require suppressing the report of every master who received deposits against his fees without explicit court order. (226 N. E. 2d 443, 447-8, 449-51; Appendix to Jurisdictional Statement, 10-11, 13-16.)

It was conceded at all times throughout the proceedings below that if the master had, in fact, been prejudiced against appellant for any reason, including his receipt of

deposits against his fees, the Illinois law provided the remedy of suppression of the master's report upon motion and proof of such prejudice. (E.g., *see* Brief and Argument for Defendants-Appellees in Illinois Appellate Court, pp. 88-89; Answer to Petition for Leave to Appeal, p. 10.) Both the trial judge and the Appellate Court independently reviewed the facts and each specifically found that (1) the master's report was fair and accurate, and (2) "It is clear that the making of the payments had no effect on the fairness of the report." (226 N. E. 2d 443, 450; Appendix to Jurisdictional Statement, 15, 16; 2 Abst. 583.)

Contrary to appellant's statement (Jurisdictional Statement, pp. 18, 91; Petition for Leave to Appeal to Illinois Supreme Court, p. 91), the court below did *not* hold, by implication or otherwise, that Rule 9.3 of the Circuit Court prevents suppression of a master's report which is unfair because the acceptance of deposits by the master caused him to be impartial (or because of any other reason). The court below *did* hold that the remedy of suppression for bias is provided in Illinois, by motion, but that there was no such bias here and a mere technical violation of Rule 9.3 which did not produce bias permits the Chancellor the discretion to deny or reduce the master's fees but does not automatically require suppression of a master's report.

It follows that the construction or application here of the "statute" (Rule 9.3) upon which appellant seeks to found jurisdiction by appeal did not involve any federal constitutional question, but presents an issue which was adequately resolved under local law. *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86, 92 (1932). The remedy of suppression of a master's report is provided under Illinois law, by motion, in every instance where any constitutional requirement of fairness and impartiality may be violated. Therefore, that a local court rule concerning the administration of payments of masters' fees is not construed as

also requiring suppression of a master's report whenever —although no unconstitional unfairness has resulted in any way—the terms of such rule may have been technically violated, does not present a federal question. *Corry* v. *Campbell,* 154 U. S. 629 (1878); *Washington* v. *Miller,* 235 U. S. 422, 429 (1914); *Loeber* v. *Schroeder,* 149 U. S. 580, 585 (1893). The determination below in respect to Rule 9.3 of the Circuit Court of Cook County rests on an adequate non-federal basis.

The only federal question which can be gleaned from this extraordinarily massive record of evidence and argument is the general claim (asserted in 2 short sentences out of 344 pages of argument before the Illinois Appellate Court) that appellant did not receive a fair trial owing to the master's prejudice against him, which prejudice—it is contended—is to be conclusively presumed, as a constitutional rule, even though contrary to the actual evidence (as here), if ever a master accepts deposits against his fees without express court order. This extreme contention does not present a substantial federal question, as will be shown below. In any event, such a procedural claim reaches only to the possibility of appellant being given a new trial; it could not in any wise permit this Court to review the multifarious questions of general equity law which it is appellant's stated purpose to have this Court decide. (Jurisdictional Statement, "Questions presented by this appeal", 1st paragraph, pp. 18-19.)

II.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED HERE.

A. The Merits of Appellant's Underlying Claim for Rescission of Contract Present No Federal Question Reviewable by This Court.

Appellant summarizes his real complaint, as follows: "The decision of the Appellate Court is contrary to the evidence as well as the manifest weight of the evidence and contrary to law and equity." (Jurisdictional Statement, p. 90.)

The substantive issues involved in appellant's claim for rescission of two business contracts constitute almost the entire bulk of his argument here (Jurisdictional Statement, pp. 24-60, 61-90); yet, they involve no conceivable questions of federal law reviewable by this Court. That no novel or significant question even of local equity law is involved is manifest from the very nature of appellant's legal approach, openly taken [" . . . to recover from defendant loan company by way of redemption, restitution *or* constructive trust", *e.g.*, Jurisdictional Statement, pp. 18-19]—which approach is simply to assemble every known and accepted legal theory upon which rescission of a contract conveying property has ever been based and then attempt to tailor his facts to fit any one or any combination of these theories. In so doing, appellant finds himself in the position where his arguments on the merits are based entirely on cases which assume that the facts in this particular case are directly otherwise than as shown by the record and as found by each of the judicial tribunals below. Not only is there no factual basis for a legal claim that any fiduciary standards of conduct are applicable to the case of a commercial pledge, where, before default, the

pledgor himself, in accord and satisfaction, sells the collateral to the pledgee (*Wetherell v. Johnson*, 208 Ill. 247, 251, 70 N. E. 229, 231 (1904); Jones, "Collateral Security and Pledges", (3rd ed.) § 555; Scott on Trusts (2d ed.), § 9, p. 83); *but*, even if the strictest fiduciary standards were applicable, the facts here are determinative of this case against appellant on any legal theory because, as found, first, by the master and then, independently, by the trial court and thoroughly reviewed by the Appellate Court they show that all fiduciary standards of fairness were met. In handling the imputation of prejudice on the part of the master, the Chancellor not only reviewed the record and the master's report and found no evidence of any inaccuracy or unfairness, but the Chancellor also did exactly as plaintiff requested and made independent findings covering all the key factual issues in this case. These findings were approved by the Appellate Court and they establish, *by decision of judicial tribunals whose fairness appellant does not deign to impugn:* that the challenged transactions were arm's length sales, openly and deliberately made, between competent and informed businessmen on an equal footing, upon full disclosure and opportunity for independent advice, and for a price which is shown to have been reasonable, adequate and fair; also, that the misleading calculations which appellant makes of commissions charged are in large part unrelated to the two sales transactions sought to be set aside and are further wholly irrelevant both legally and factually because commissions charged were never paid and appellant was under no pressure at the time of the challenged transactions to pay any commissions but, rather, such economic pressure as he may have been under came from the demands of appellant's other creditors and obligations. These are the independent findings of fact made by the trial court itself. (2 Abst. 584.)

The United States Supreme Court will not exert its

jurisdiction merely to review a decision of a state court upon questions of general equity law (such as those allegedly applicable here to the rescission of contracts); nor will it review questions such as here, which concern only challenged findings of fact applying settled legal principles to a controversy which is of interest only to the particular parties. *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6 (1945); *Yazoo & Miss. R. R. Co.* v. *Brewer*, 231 U. S. 245, 249 (1913); *Kenny* v. *Craven*, 215 U. S. 125, 129-30 (1909); *Lowry* v. *Silver City Mining Co.*, 179 U. S. 196 (1900); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 83 (1901); *Illinois* v. *Economy Power Co.*, 234 U. S. 497 (1913); *Telluride Power Co.* v. *Rio Grande Ry.*, 175 U. S. 639, 647 (1899).

B. Appellant's Procedural Claim of No Fair Hearing Presents No Substantial Issue.

Appellant's claim of denial of procedural due process involves no novel or fairly debatable questions of constitutional law. Appellant's right, as a litigant, to trial by an impartial tribunal is conceded as a matter of law and was unquestioned below. Again, appellant's difficulty comes from his assertion of claims which are simply refuted by the facts as contained in the record here and in the findings of the lower courts.

Appellant's charge of prejudice on the part of the master-in-chancery has been given most careful and solicitous treatment by the trial court and by the Appellate Court below, both of which made specific determinations—manifestly supported by the record—that there was no basis whatsoever for sustaining any such charge. (2 Abst. 583; 226 N. E. 2d 443, 447-8, 450, Appendix to Jurisdictional Statement, pp. 11, 15-16.) Such findings of fact of the state courts on issues involved in the application of known federal rights to a particular situation in one individual case

are not reviewed by this Court unless they are without any support in the evidence. *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 294 (1941); *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 566-7 (1916).

Appellant is finally reduced to the untenable assertions that one has a Federal constitutional right to have a master's report set aside as being unfair "without the necessity of proving prejudice or partiality" and it is "an unconstitutional burden" to require a person who moves to set aside a master's report for unfairness "to prove prejudice or partiality on part of the master". (Jurisdictional Statement, pp. 18, 19.) Apart from the fact that—because of the Chancellor's independent consideration of the record here—suppressing the master's report would not, in any event, alter the independent judicial basis sustaining the judgment below, it patently does not present a serious and substantial legal question to argue that acceptance of deposits against his fees by a master-in-chancery requires, as a matter of constitutional law, that a conclusive presumption of prejudice in favor of the depositing party be applied. Indeed, the very facts of the present case show why any such conclusive presumption would be wholly unacceptable as a constitutional rule. Here the record and the master's report can be (and have been) rigorously examined without finding any hint of prejudice. Appellant, for whose benefit the defendants below waived their right under the local practice to curtail their opponent's proof unless he made substantial deposits to cover master's fees, now complains that this waiver—although he accepted it and received its benefits and conducted hearings before the master for some 8 years without any expense to himself—was "improper" and "secret" and necessarily and conclusively resulted in his not getting a fair trial. (Jurisdictional Statement, pp. 18, 19, 90-91.) These claims are not only self-stultifying, but they are made

with reckless disregard for the facts and for the determination of the trial court that they have absolutely no support in the evidence.

It should be remembered that appellant does not and cannot complain about the fairness of the Chancellor—the judicial tribunal which, in fact, first decided his case at the trial court level. The master only compiled the evidence and made recommendations to the Chancellor. In some cases the acceptance of the master's recommendations by the Chancellor may be somewhat automatic, but in the present case this was clearly not so. Just as plaintiff had requested, the trial court extended itself and took many months to go through the record, plaintiff's compendious statements of the evidence, and briefs, in order to make its own findings —independent of the master's actions in making his report —covering the key points in this case. These independent findings, made by a concededly unbiased trial court, are wholly sufficient in themselves to support the decree below; and thereby disappears the last vestige of any federal law claim based on any purported action of the master. *Bailey* v. *Anderson,* 326 U. S. 203, 205 (1945). The independent determination by the Chancellor is an adequate and independent non-federal ground upon which to base the judgment below. *Wilson* v. *Loew's, Inc.,* 355 U. S. 597, 598 (1958); *Durley* v. *Mayo,* 351 U. S. 277 (1956); *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2 (1940); *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210-11 (1935); *Rogers* v. *Jones,* 214 U. S. 196, 204 (1909).

This appeal is only an effort by a disappointed litigant to get this Court to find that the facts are absolutely contrary to what each of the state judicial tribunals below has independently and unequivocally found them to be.

CONCLUSION.

It is respectfully submitted that this appeal should be dismissed, because the purported issue of the constitutional validity of a local trial court administrative rule was neither properly raised nor passed on below and because the questions and rulings below relating to that local rule are matters which rest on state law and adequate non-federal grounds of decision.

In any event, the appeal should be dismissed (and, treated as a petition for writ of certiorari, said petition should be denied) for want of any substantial federal question. This case turns entirely on the findings of fact made below, the absence of any substantial constitutional question having been heretofore recognized by appellant in electing the procedure which he followed in the state courts below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

NO. 1103

MILDRED R. LAHMAN surviving widow and administrator of estate of John H. Lahman deceased

appellant

VS

W. E. GOULD AND COMPANY, HARRIET B. GOULD executor of will of W. E. Gould deceased and PHILIP H. MITCHEL master in chancery

appellees

APPEALS FROM THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT AND SUPREME COURT OF ILLINOIS

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

MILDRED R. LAHMAN surviving widow and administrator of estate of John H. Lahman deceased

appellant

VS

W. E. GOULD AND COMPANY, HARRIET B. GOULD executor of will of W. E. Gould deceased and PHILIP H. MITCHEL master in chancery

appellees

APPEALS FROM THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT AND SUPREME COURT OF ILLINOIS

BRIEF OPPOSING MOTION TO DISMISS APPEAL

Appellant respectfully submits this brief opposing appellees' motion to dismiss this appeal.

Appellees ignore the fact that in this case there are two grounds for jurisdiction of the court to review the Illinois court's decision: 1. by writ of certiorari and 2. by appeal

1. By writ of certiorari—Under the rulings of the Illinois courts, commencing with the trial court and continuing through the Illinois appellate and supreme courts, Lahman, his estate and his creditors stand adversely af-

fected by the tainted findings of the master—a judicial officer—who throughout the crucial decision-making period while Lahman's rights were before him for adjudication was in effect on appellee loan company's payroll with a *"guarantee"* by the loan company that the loan company would pay all his fees, pursuant to which guarantee the master received from the loan company four secret payments aggregating $20,000. Jurisdictional Statement 4-8.

Thus Lahman, his estate and his creditors are deprived of procedural due process of law guaranteed by section 1 amendment XIV of the United States constitution. Jurisdictional Statement 11-16.

This court has jurisdiction to review the Illinois court's judgment by writ of certiorari under §1257(3) 28 US Code as this is a case (a) which involves the construction and application of the United States constitution and (b) in which a right or privilege is claimed under the United States constitution. Stern and Gressman, *Supreme Court Practice,* third edition pp. 70, 71.

2. By appeal—Commencing with the Illinois appellate court and continuing through the Illinois supreme court, the Illinois courts held that rule 9.3 of rules of circuit court of Cook county Illinois by implication excludes the remedy of suppression of the master's reports for the wrongful conduct of the master involved in this case. Rule 9.3 as applied and enforced by the Illinois appellate court and the Illinois supreme court is unconstitutional as violative of the due process clause of section 1 amendment XIV of the United States constitution.

Rule 9.3 is a "statute" within the meaning of §1257(2) 28 US Code—Jurisdictional Statement 17—and this court has jurisdiction to review the Illinois court's judgment by appeal under §1257(2) as this is a case where there is

drawn in question the validity of a state statute on the ground of its being repugnant to the United States constitution and the decision is in favor of its validity.

While the ground supporting jurisdiction of this court by writ of certiorari arose in the trial court the ground supporting jurisdiction of this court by appeal arose for the first time in the Illinois appellate court

The ground supporting jurisdiction of this court by writ of certiorari arose in the trial court in or about February 1964 when Lahman learned that appellees had given the master a *"guarantee"* to pay all his fees and pursuant thereto the master had received four secret payments aggregating $20,000.

Circuit court rule 9.3 is not unconstitutional on its face. The trial court did not even refer to this rule in any of its orders or decrees and did not therefore apply or enforce it unconstitutionally.

It was the Illinois appellate court that first applied and enforced rule 9.3 unconstitutionally in holding that the rule by implication excludes the remedy of suppression of the master's reports for the wrongful conduct of the master involved in this case and this unconstitutional action did not become known to Lahman until April 18, 1967 when the Illinois appellate court issued its opinion.

Thus until April 18, 1967 there was no reason for Lahman to raise any question concerning the constitutionality of rule 9.3 and his failure to do so prior to April 18, 1967 does not in anywise affect the right of Lahman, his estate or his creditors after April 18, 1967 to question the constitutionality of rule 9.3 as applied and enforced by the Illinois appellate court and Illinois supreme court.

Appellees erroneously assert that procedure Lahman followed in Illinois courts contradicts claim of substantial federal questions (appellees' motion 6, 7)—Even as to the federal constitutional questions that came into this case at the trial court level, the circumstance that Lahman appealed to Illinois appellate court rather than directly to Illinois supreme court does not impair Lahman's right to seek review of the state court's judgment by this court.

Pertinent Illinois supreme court rule 365(a) provides:

> "The taking of an appeal to either the Supreme Court or the Appellate Court shall not be deemed a waiver of the right to present any issue to the appropriate court". *Ill Rev Stat* 1967 ch 110a §365 (a)

The concluding sentence in the Illinois supreme court's opinion in *First National Bank & Trust Co.* v *Evanston* 30 Ill 2d 475 1964 at 486 is:

> "The underlying constitutional issues are not waived by an appeal to the Appellate Court."

As to the federal constitutional questions that came into this case for the first time in the Illinois appellate court as a result of the April 18, 1967 decision of that court, obviously the circumstance that Lahman appealed to the Illinois appellate court rather than directly to the Illinois supreme court cannot impair Lahman's right to seek review of the state court's judgment by this court.

Appellees do not cite any Illinois case and we do not know of any which supports appellees' assertion at page 7 of their motion that if a constitutional question appears in the course of the Illinois appellate court appeal that court would transfer the case immediately to the Illinois supreme court.

Appellees erroneously assert that validity of circuit court rule 9.3 was not timely or properly raised or passed

on below (appellees' motion 8-10)—We repeat that circuit court rule 9.3 is not unconstitutional on its face and there was no reason for Lahman to raise any question concerning the constitutionality of the rule prior to April 18, 1967 when the Illinois appellate court issued its opinion and for the first time in these proceedings applied and enforced the rule unconstitutionally.

Promptly thereafter at the first opportunity Lahman in his petition filed June 19, 1967 for leave to appeal to Illinois supreme court at page 91 contended that rule 9.3 as applied and enforced by Illinois appellate court is unconstitutional as violative of the due process clause of section 1 amendment XIV of United States constitution.

On September 26, 1967 the Illinois supreme court considered the petition for leave to appeal and denied the same.

In Lahman's motion filed in Illinois supreme court October 16, 1967 for reconsideration of petition for leave to appeal he again contended that rule 9.3 is invalid as applied by the Illinois appellate court by reason of repugnancy to the due process clause of section 1 amendment XIV of United States constitution.

On November 21, 1967 the Illinois supreme court considered the motion for reconsideration of petition for leave to appeal and denied the same.

Appellees' point that the state court did not expressly pass on the constitutionality of rule 9.3 is conclusively answered by Stern and Gressman *Supreme Court Practice* third edition at page 67:

> "In the setting of §1257 (2), an appeal will lie even though the state court is not explicit in overruling a timely challenge on federal grounds to the validity of the state statute, although the challenge itself must

be explicit. See *Largent* v. *Texas,* 318 US 418. As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal under §1257 (2)—a result in sharp contrast with the significance under §1257 (1) of silence relative to a claimed invalidity of a federal statute or treaty. Thus an erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of §1257 (2), so that an appeal will lie. *Lawrence* v. *State Tax Commission,* 286 US 276, 282-3.

"The 'validity' of a state statute is also said to have been sustained, within the meaning of §1257 (2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 US 282. This is true even though the statute on its face bears no federal impediment. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts. *Id.*"

Appellee's argument at page 9 of their motion concerning formal requirements of briefs in Illinois appellate and Illinois supreme courts ignores two important facts:

1. All of Lahman's Illinois appellate court briefs were due and were filed *before* April 18, 1967 when the "construction or validity" of rule 9.3 first became involved as a result of the Illinois appellate court's final decision; and

2. As the Illinois supreme court denied Lahman's petition for leave to appeal and motion to reconsider that petition Lahman did not file any briefs in the Illinois supreme court.

Appellees erroneously assert that Illinois court's decision rests on adequate non-federal basis (appellees' mo-

tion 10-12)—Appellees seem to contend that all the master did was to commit a "technical" breach of an "administrative" rule by accepting "deposits against his fees without explicit court order."

This, say appellees, constitutes the adequate non-federal basis for the Illinois court's decision.

But the facts are, according to the testimony of the master himself—Jurisdictional Statement pp 6, 7—that throughout the crucial decision-making period while Lahman's rights were before the master for adjudication the master was in effect on appellees' payroll. He stood in the position of a paid employee of appellee loan company with *"guarantee"* by the loan company that the loan company would pay all his fees, pursuant to which the master actually received four secret payments aggregating $20,000.

We know of no method by which appellees can circumvent the federal constitutional question indelibly put in this case by the master's own testimony.

This court will decide for itself facts or constructions on which federal constitutional issues rest. Stern and Gressman, *Supreme Court Practice,* third edition 113.

Appellees evidence their weakness at page 12 of their motion by stating that Lahman's contention of lack of procedural due process of law

> "reaches only the possibility of appellant being given a new trial."

This is all Lahman asks and he would be satisfied with a new trial in this court or in an Illinois court which would adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in this record entirely uninfluenced by the tainted findings and conclusions of the master.

The so-called "independent findings" of the trial court and Illinois appellate court—(appellees' motion 5, 14, 16, 17)—Appellees being quite aware of the danger inherent in attempting to justify the adoption and use by the trial court and Illinois appellate court of the tainted findings and conclusions of the master, attempt to circumvent this danger by repeatedly asserting that those courts made "independent findings", that is, findings not based on or influenced by the tainted findings of the master, and that those lily-white "independent findings" are numerous and comprehensive enough to support the judgments of those courts.

In view of the fact that the trial court expressly approved the master's report and then "based on that report" proceeded to adjudicate the rights of the parties—2 abs 581-85, and the fact that the Illinois appellate court expressly held that Lahman was bound by the "findings of the master" unless he can show they are "manifestly against the weight of the evidence"—Jurisdictional Statement 10—we would be interested to learn how appellees performed the impossible task of separating the so-called "independent findings" from the findings that are based on or influenced by the tainted findings of the master.

Obviously appellees do not attempt to point out or make a list of the findings they would like to say are "independent findings."

Appellees erroneously assert that Lahman does not question fairness of the trial court or the Illinois appellate court (appellees' motion 3, 4, 14, 17)—Lahman's position is and has been that in order for the trial court and Illinois appellate court to be fair they should have suppressed the master's reports and proceeded to make find-

ings and conclusions and adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in the record entirely uninfluenced by the tainted findings and conclusions of the master. But this the trial court and Illinois appellate court did not do but treated the findings and conclusions of the master as valid and gave full effect thereto. Jurisdictional Statement 9, 10.

Appellees misstate testimony relating to why appellees did not apply to trial court for order concerning security for master's fees—Appellees well knew when Lahman commenced these proceedings that Lahman was a poor person without funds and could not afford a reference to a master which would greatly increase the costs and expenses of litigation. Despite this knowledge it was appellees, not Lahman, who chose the expensive course and caused the case to be referred to the master. 2 abs 536, 537.

On June 6, 1956 at a hearing before the master appellees through then attorney Abraham stated that each side should be required to put up a substantial cash deposit so that appellees would have some assurance that appellees would not have to pay all the expenses. The master told Abraham that the master had no authority to ask for deposits and that the question of deposits should be answered over at the courthouse. Lahman's then attorney Kutner stated he would like for Abraham to file a sworn petition in court and try to get it granted. Abraham replied that he would do that. 2 abs 551.

Abraham did not petition the court for a ruling on the matter as he said he would. Instead, according to his testimony, he again initiated a discussion before the master relative to making deposits or payments on account of

master's fees at which time appellees agreed to *"guarantee"* the master's fees.

At least three reasons can be suggested why Abraham elected not to present this matter to the trial court:

1. The master's fees which had been earned and accrued at the time in question probably did not exceed $500 —2 abs 535, 536, and Abraham realized that the earned or accrued master's fees at that time were so small that the court would not look kindly on his petition;

2. Abraham realized that if Lahman so requested the court would permit Lahman to sue as a poor person and probably would require Abraham's clients to put up the deposits if any—2 abs 536-38; and

3. Abraham realized that once the matter of making deposits or payments on account of master's fees was passed on by the trial court his opportunity to use this matter either to curry favor with the master or to pressure, embarrass or discourage Lahman would be seriously diminished if not entirely eliminated.

Abraham's testimony appears at 2 abs 514-16.

At page 4 of their motion appellees assert that Abraham testified he agreed with Lahman *not* to go before the trial court for an order requiring deposits out of consideration to Lahman's financial plight.

This assertion not only misstates Abraham's testimony but also misstates the reason why Abraham elected not to apply to the trial court for an order concerning security for master's fees.

The master was prejudiced against Lahman both as a matter of law and as a matter of fact—The theory sponsored by appellees that before Lahman can complain of the tainted findings and conclusions of the master Lahman affirmatively has to prove prejudice or partiality on the part of the master is not acceptable. This would impose on Lahman a very difficult, if not impossible, task—

an unconstitutional burden—and deprive him of procedural due process of law guaranteed by section 1 amendment XIV of United States constitution. Jurisdictional Statement 11-15, 19-22.

In the instant case however the master's reports show on their face that the master was in fact prejudiced against Lahman and in favor of his benefactor, the appellee loan company. 2 abs 565-80.

Conclusion

Appellees' motion to dismiss this appeal should be denied, this court should exercise its jurisdiction and either proceed to adjudicate the rights of the parties on the basis of the transcript of testimony and evidence in the record, entirely uninfluenced by the tainted findings and conclusions of the master or the Illinois courts which are based on those findings and conclusions, or remand this case to the appropriate Illinois court with directions to so proceed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

LAHMAN *v.* W. E. GOULD & CO. ET AL.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

No. 1103. Decided March 25, 1968.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.